FILED
SEP 27 2004
OFFICE OF THE CLERK

No. 04 438

IN THE

Supreme Court of the United States

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1617; ARTHUR CELESTINO; AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL NUMBER 214,
Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

HAL K. GILLESPIE *
GILLESPIE, ROZEN, WATSKY,
& MOTLEY, P.C.
3402 Oak Grove Avenue, Suite 200
Dallas, Texas 75204
(214) 720-2009

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Does the *Steelworker Trilogy* apply to FLRA review of arbitration decisions pursuant to collective bargaining agreements of federal employees?

2. If the FLRA overturns an arbitrator's interpretation of a collective bargaining agreement, does the district court have subject matter jurisdiction to restore the arbitration award?

LIST OF PARTIES AND RULE 29.6 LIST

The parties before the Court of Appeals and this Court are listed below. To Petitioners' knowledge, the Federal Labor Relations Authority has no parent companies or non-wholly owned subsidiaries.

American Federation of Government Employees, Local 1617	Plaintiff/Petitioner
Arthur Celestino	Plaintiff/Petitioner
American Federation of Government Employees, Council Number 214	Plaintiff/Petitioner
Hal K. Gillespie	Attorney for Plaintiff/Petitioner
Federal Labor Relations Authority	Defendant/Respondent
James F. Blandford	Attorney for Defendant/Respondent
Solicitor General of the United States	Attorney for Defendant/Respondent

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 29.6 LIST	ii
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
A. Nature of the Case and Proceedings Below	3
B. Factual Background	4
REASONS FOR GRANTING THE WRIT	9
A. The Court Should Grant Certiorari because of a Split in the Circuits over whether the Federal Labor Relations Authority is restricted in its review of arbitration awards under the guidelines in the *Steelworkers Trilogy*	10
1. Background to the FLRA's authority under the FLMRA	10
2. Split in the circuits	12
a. District of Columbia	12
b. Fifth Circuit	13
B. The Court Should Grant Certiorari Because the Fifth Circuit has decided an important federal question in a way which conflicts with relevant decisions of this Court in the *Steelworkers Trilogy* and *Leedom v. Kyne*	15

TABLE OF CONTENTS—Continued

Page

C. The Court Should Grant Certiorari Because the Fifth Circuit's Holding that the *Steelworkers Trilogy* opinions do not provide guidance on its jurisdiction over FLRA decisions is an important question of federal law that has not been, but should be, settled by this Court 19

CONCLUSION 24

APPENDICES 1a

TABLE OF AUTHORITIES

CASES — Page

Boire v. Greyhound Corp., 376 U.S. 473 (1964)... 15, 18
Board of Governers of the Fed. Reserve v. MCorp Financial Inc., 502 U.S. 32 (1991)..... 15, 16
Circuit City Stores v. Adams, 532 U.S. 105 (2001)..... 23
Cornelius v. Nutt, 472 U.S. 648, 662 (1985)..... 12
Devine v. White, 697 F.2d 421, 440 (D.C. Cir. 1983)..... 12
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 23
Leedom v. Kyne, 358 U.S. 184, 79 S.Ct. 180 (1958).....3, 6, 9, 15-18
Saraw Partnership v. United States, 67 F.3d 567, 569, (5th Cir. 1995) 19
Suzal v. Director, United States Information Agency, 32 F.3d 574, 578 (D.C. Cir. 1994)..... 16
United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 9, 13, 19-22
United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960).....9, 20-22
United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)..... 9, 20
United Paperworkers v. Misco, Inc., 484 U.S. 29 (1987).....18, 20-22
United States Dept. of Justice v. FLRA, 981 F.2d 1339, 1344, n2 (D.C. Cir. 1993)..... 12
United States Dept. of Treasury, Customs Service v. F.L.R.A., 43 F.3d 682, 686-687 (D.C. Cir. 1995)..... 12-14

TABLE OF AUTHORITIES—Continued

ARBITRATION RULINGS AND FEDERAL LABOR RELATIONS AUTHORITY RULINGS — Page

American Federation of Government Employees Local Union No. 1617 and San Antonio Air Logistics Center, Kelly Air Force Base, San Antonio, Texas FMCS Case No. 99-17655 5

United States Dept. Of Air Force, San Antonio Air Logistics Ctr., Kelly Air Force Base San Antonio, Tex., 58 F.L.R.A. 63 (2002) 7

United States Dept. Of Air Force, San Antonio Air Logistics Ctr., Kelly Air Force Base San Antonio, Tex., 58 F.L.R.A. 71, (2002) 7

United States Dept. of Army, Fort Campbell Dist., v. American Federation of Government Employees, Local 2022, 37 (F.L.R.A. 1990) 9

United States Dept. of Health and Human Services v. AFGE Council 147, 38 FLRA 1183, 1188 (1990) 23

United States Dept. of Labor (OSHA) and National Council of Field Labor Locals, 34 FLRA 573, 576 (1990) 23

STATUTES

5 U.S.C. § 702 4
5 U.S.C. § 705 4
5 U.S.C. § 706 4
5 U.S.C. § 7101 ..... 2, 10
5 U.S.C. § 7102 2
5 U.S.C. § 7104 ..... 2, 10
5 U.S.C. § 7105(a)(2)(H) 2, 3, 10
5 U.S.C. § 7122 ..... 2, 3, 10, 11
5 U.S.C. § 7122(a)(2) 10, 13, 14, 18
5 U.S.C. § 7123 ..... 3, 14
5 U.S.C. § 7123(a)(1) 16

TABLE OF AUTHORITIES—Continued

	Page
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	4
28 U.S.C. § 1337	4
28 U.S.C. § 1361	4
28 U.S.C. § 2201	4
28 U.S.C. § 2202	4
RULES	
Supreme Court Rule 13.1	2
Supreme Court Rule 14.1(f)	3
Fed. R. Civ. P. 12(b)1	3, 19
SUPPLEMENTAL AUTHORITY	
H.R. Conf. Rep. No. 1717, 95th Cong., 2nd Sess. 153 (1978)	11, 14
Elkouri & Elkouri, How Arbitration Works, 1300-1301, (Ruben ed., 6th ed. 2003)	22

IN THE

Supreme Court of the United States

No. ___

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1617; ARTHUR CELESTINO; AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,COUNCIL NUMBER 214,
Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

American Federation of Government Employees, Local 1617, Arthur Celestino, and American Federation of Government Employees, Council Number 214 pray for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on June 29, 2004.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is contained in the Appendix. *See* App. A. A copy of the Order Accepting Report and Recommendation of United States Magistrate Judge of United States District Court for the Western Division of Texas is contained in the Appendix. *See* App. B. A copy of the decision of the Federal Labor Relations Authority is con-

tained in the Appendix. *See* App. C. Excerpts relevant for the Court's review of this petition for certiorari of the 286 page arbitration opinion and award are also contained in the Appendix. *See* App. D

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) to review a decision of the United States Court of Appeals for the Fifth Circuit by writ of certiorari after rendering judgment. The decision for which review is sought was entered on June 29, 2004. Pursuant to this Court's Rule 13.1, this petition for writ of certiorari is timely because it is being filed within ninety days after entry of judgment.

STATUTES INVOLVED

This case involves the Federal Labor Management Relations Act (the FLMRA), 5 U.S.C. §7101 *et seq.* Of particular relevance in this case are:

5 U.S.C. § 7101 which states the Findings and Purpose of the FLMRA, indicating it is in the public interest to protect the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them.

5 U.S.C. § 7102 which states that federal sector employees are granted the right to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

5 U.S.C. § 7104 which establishes the creation of the Federal Labor Relations Authority.

5 U.S.C. § 7105(a)(2)(H) which grants the FLRA authority to resolve exceptions to arbitrator's awards pursuant to the limitations of §7122.

5 U.S.C. § 7122 which establishes the limitations of the FLRA's authority to review arbitration awards.

5 U.S.C. § 7123 which establishes judicial review and enforcement of the FLMRA.

The Appendix contains the full text of these statutes pursuant to Sup.Ct.R. 14.1(f). *See* App. E-J.

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

Petitioners filed their First Amended Complaint on March 18, 2003 seeking to reinstate an arbitration award which had been overruled by the Federal Labor Relations Authority. In October 2003, the district court granted the FLRA's 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, denied Petitioners' cross-motion for summary judgment, and dismissed for lack of subject matter jurisdiction. Petitioners timely appealed to the United States Court of Appeals for the Fifth Circuit. A three-judge panel of the Fifth Circuit affirmed the judgment of the district court in June of 2004.

The FLRA contested the jurisdiction of the district court. Petitioners contended the district court had jurisdiction over Petitioners' claims because the FLRA, reviewing the decision of a labor arbitrator pursuant to 5 U.S.C. § 7105(a)(2)(H) and 7122, violated the teachings of the *Steelworkers Trilogy* by substituting its interpretation of a collective bargaining agreement for that of the arbitrator. By doing so, the FLRA exceeded the limited scope of review for arbitration awards conferred on it by Congress in 5 U.S.C. § 7122(a)(2). Therefore, the district court had jurisdiction under the *Leedom v. Kyne* exception to the foreclosure of judicial review under federal acts, created in *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180 (1958). Petitioners argued that because the district court held subject matter jurisdiction under *Leedom v. Kyne*, the district court also had general subject matter jurisdiction

under 28 U.S.C. §§ 1331, 1337, and 1361, and under 28 U.S.C. §§ 2201 and 2202, as Petitioners sought declaratory relief and review of an action of an agency of the United States pursuant to 5 U.S.C. §§ 702, 705, and 706.

The district court dismissed Petitioners' claims claiming a lack of subject matter jurisdiction. Petitioners timely appealed this decision to the Fifth Circuit Court of Appeals. On June 29, 2004 the Fifth Circuit affirmed.

B. Factual Background

Petitioners won their arbitration case that sought environmental differential pay due to exposure on the job to potentially harmful levels of airborne asbestos in a 286 page arbitration decision dated October 9, 2001. The FLRA, in a split decision, overruled and set aside the arbitrator's opinion and award. After the FLRA denied rehearing, Petitioners sued in federal district court to reinstate the arbitrator's award and opinion and to require the FLRA to hear Petitioners' exception concerning the limitation of remedy in the arbitration opinion and award on grounds that the FLRA had overstepped its statutory authority in overruling the arbitrator's interpretation of the underlying parties' collective bargaining agreement. The district court dismissed Petitioner's suit for lack of subject matter jurisdiction and the Fifth Circuit Court of Appeals affirmed.

Factually, this case arises out of an Environmental Differential Pay ("EDP") grievance and arbitration filed by employees at Kelly Air Force Base ("KAFB") in San Antonio, Texas, seeking EDP and backpay for exposure to airborne asbestos. At all times pertinent to the underlying grievance and arbitration, bargaining unit members at KAFB were covered by a collective bargaining agreement entitled "Master Labor Agreement" ("MLA"). EDP was covered in the parties' MLA and was subject to interpretation by the arbitrator. Pursuant to the parties' MLA, the parties selected

an arbitrator from the Federal Mediation and Conciliation Service (FMCS) and a multi-week arbitration was held regarding the EDP claims in FMCS Case No. 99-17655 before the Honorable Larry D. Smith. The parties stipulated that the arbitrator was properly selected, pursuant to the parties' collective bargaining agreement, and that the Arbitrator had jurisdiction to determine all the issues set forth in the arbitrator's opinion and award. (App. D, at 51a).

During the arbitration, KAFB contended that the Air Force had issued regulations regarding EDP, which tied EDP to the United States Occupational Safety and Health Administration's Permissible Exposure Limit (referred to as the "OSHA PEL" standard) and that those regulations trumped the agreement of the parties as found in the MLA. The Union argued, and the arbitrator agreed, that the Air Force regulations were in conflict with the MLA because the MLA required a case-by-case analysis of entitlement to EDP, specifically rejecting any predetermined level of entitlement.

Based on his interpretation of the MLA, Arbitrator Smith issued a 286 page Award and Opinion that granted limited EDP backpay and interest to the bargaining unit employees at KAFB. (App. D) Arbitrator Smith's opinion and award was tied to his interpretation of the parties' MLA in holding: "The parties did not ***contractually*** agree to use the OSHA PEL as the point of entitlement to EDP" and "the ***words of the MLA*** were crafted with the apparent intent to incorporate the bargaining objective of the Union to avoid ***any*** definition of "practically eliminated." (App. D, at 62a-63a, emphasis added).

The arbitrator's interpretation of the meaning of the "words of the MLA" was supported by extensive evidence presented during the arbitration regarding the intention of the parties in

drafting the MLA. Based on the evidence presented Arbitrator Smith found:

> No credible evidence exists to show that the Union has ever, from the bargaining table activity of the first MLA to the time of the filing of this grievance, agreed that EDP entitlement occurs only in the event of a breach of the OSHA PEL. To the contrary, the Union has always contended that EDP should be considered and decided on a case-by-case basis without any strict reliance upon the OSHA PEL or for that matter, any other specific level of exposure.

(App. D, at 60a). Having interpreted the meaning of the parties' MLA, the Arbitrator, inter alia, retained jurisdiction and made these findings:

> 2. The parties did not contractually agree to use the OSHA PEL as the point of entitlement to EDP. . .
>
> 7. Bargaining unit employees have been exposed to airborne concentrations of asbestos fibers. . .
>
> 8. It is reasonably possible that such exposure may result in illness or injury.
>
> 9. Protective equipment or other safety device has not essentially removed the possibility of such injury or illness.
>
> 10. The Agency violated Section 26.01 of the collective bargaining agreement and such a violation is an unwarranted and/or unjustified personnel act.
>
> 11. The Agency's unwarranted and/or unjustified personnel act entitles employees to compensation pursuant to the Back Pay Act, in order to remedy the failure of the Agency to pay an environmental differential in violation of Article 26.01.

(App. D, at 67a-68a).

After the arbitration award, KAFB filed exceptions with the FLRA to overturn the arbitrator's ruling. KAFB's

primary exception to the arbitrator's ruling was that the Air Force regulation was "not inconsistent with the parties' MLA." The Union responded to KAFB's exception by pointing out that the arbitrator had specifically ruled that the parties' MLA was contrary to the Air Force's unilateral regulation.

On September 11, 2002, over the dissent of Member Pope, the FLRA set aside the arbitration award in its entirety on grounds that the Air Force regulations "do not conflict with the collective bargaining agreement," and the Air Force regulations "are specifically linked to the payment of EDP."[1]

In overturning the Arbitrator's decision, the FLRA had to first disagree with the Arbitrator's interpretation of the parties' MLA, and *then* make its own interpretation of the MLA. Obscuring this key fact—that the FLRA had to reject the arbitrator's interpretation of the MLA before making its own interpretation the MLA—is the FLRA's portrayal of its *rejection* of the Arbitrator's interpretation of the MLA as an *agreement* with the Arbitrator's interpretation of the MLA. The FLRA does this in a single sentence of its majority opinion, stating:

> On the basis of the Arbitrator's interpretation of the agreement, we find that the [Air Force regulations] do not conflict with provisions of the agreement.

The FLRA further occludes its re-interpretation of the MLA by taking small portions of the Arbitrator's own language and

---

[1] *United States Dept. Of Air Force, San Antonio Air Logistics Ctr., Kelly Air Force Base San Antonio, Tex.*, 58 F.L.R.A. 63 (2002). (App. C). In addition to rending the September 11, 2002 opinion which set aside the arbitrator's opinion and award of backpay, the FLRA issued a "supplement order" regarding a subsequent order of the arbitrator in which the arbitrator ordered the facilitation of the backpay award and differed on the issue of attorneys fees. *United States Dept. Of Air Force, San Antonio Air Logistics Ctr., Kelly Air Force Base San Antonio, Tex.*, 58 F.L.R.A. 71, (2002).

making it appear that the FLRA and the Arbitrator agree on the interpretation of the MLA.

While the FLRA majority purports to agree with the arbitrator's interpretation of the parties' MLA, the holdings of Arbitrator Smith and the FLRA (majority) on the meaning of the MLA are incongruous. Per the majority FLRA opinion, because the MLA did not set a *specific threshold* standard for payment of asbestos related EDP,[2] the Air Force regulation setting a specific standard was not inconsistent with the MLA. This reasoning is pure contract interpretation of the worst sort, in that it would deny the parties the right to agree that instead of having a specific threshold standard for entitlement to EDP, the entitlement could be determined on a case-by-case basis by an arbitrator if the parties disputed entitlement. The contract interpretation by the FLRA majority was the opposite of the contract construction of Arbitrator Smith, who found that the MLA was inconsistent with the Air Force regulation, which limited EDP awards for asbestos exposure to cases where exposure at the OSHA PEL could be established, because the MLA rejected any attempt to establish a *specific standard*, including but not limited to the OSHA PEL.

FLRA Member Pope's dissent faults the majority for interfering with the arbitrator's interpretation of the MLA:

> The majority distorts the award by relying on the Arbitrator's statements that Article 26.01 contains "no specific standard" to trigger EDP and that the parties had not "'agree[d] to a specific standard.'" Majority at 13. It is clear, in this regard, that in finding the parties did not agree to a specific standard, the Arbitrator found that they did not agree to a specific *predetermined, quan-*

[2] A specific threshold standard–the OSHA PEL–was what the Air Force sought in bargaining and did not get, per the findings of the arbitrator. Arbitrator Smith specifically discredited the testimony of Agency witnesses and credited Union witnesses on this issue.

> *titative* standard. As noted above, the Arbitrator undeniably rejected the Agency's argument that the Union had agreed to adopt the OSHA standard **and found, as a matter of contract interpretation**, that the agreement incorporated the Union's position that the standard would be determined case-by-case in arbitration. Thus, the majority is permitting the Agency to accomp lish precisely what *Fort Campbell*[3] prohibits: trumping a collective bargaining agreement with a conflicting Agency regulation.

(App. C, at 40a) (emphasis added).

REASONS FOR GRANTING THE WRIT

Powerful reasons exist for granting certiorari. The Fifth Circuit's decision in *AFGE 1617 v. FLRA* (App. A) deepens a split between the circuits on an important matter of federal law regarding the extent to which the FLRA's authority to review arbitration awards is limited by the *Steelworkers Trilogy*[4] and "on other grounds similar to those applied by Federal courts in private sector labor-management relations." In addition to the split among the circuits, the Fifth Circuit's decision in *AFGE 1617* decides important questions of federal law in a way that conflicts with this Court's holdings in the *Steelworker Trilogy* and *Leedom v. Kyne*.[5] Finally, certiorari should be granted because *AFGE 1617* decides crucial questions of federal law which have not, but should

---

[3] *United States Dept. of Army, Fort Campbell Dist., v. American Federation of Government Employees, Local 2022*, 37 (F.L.R.A. 1990).

[4] *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, (1960); *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

[5] *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180 (1958)(holding that general subject matter jurisdiction is vested in district courts when an agency acts beyond its authority as granted within its enabling statute).

be, settled by this Court in order to solidify and uphold federal sector employees' rights to collective bargaining under the Federal Labor-Management Relations Act, 5 U.S.C. §7101 *et. seq.* ("FLMRA" or "Act").

A. The Court Should Grant Certiorari because of a Split in the Circuits over whether the Federal Labor Relations Authority is restricted in its review of arbitration awards under the guidelines in the *Steelworkers Trilogy*.

There is a split in the circuits about whether the *Steelworkers Trilogy*, with its high level of deference to arbitrators' interpretation of collective bargaining agreements, places any limits on the FLRA's authority to review arbitral awards in the federal sector.[6] Currently, only the District of Colombia Circuit has addressed this necessary restriction on the FLRA's authority.

1. Background to the FLRA's Authority under the FLMRA

The FLRA is a three member panel mandated in 5 U.S.C. § 7104 that draws its powers and duties from § 7105 of the Act. Specifically, § 7105(a)(2)(H) of the Act gives the FLRA the limited power and duty to "resolve exceptions to arbitrator's awards under section 7122" of the Act. Section 7122 limits the FLRA's review power by specifying that the FLRA may only review exceptions to an arbitrator's award if that award is, "deficient (1) because it is contrary to any law,

---

[6] The Fifth Circuit opinion finesses the impact of the *Steelworkers Trilogy*, by holding that these opinions "do not provide guidance on [its] jurisdiction over FLRA decisions." (App. A, at 9a). Under *Leedom*, however, if the *Steelworkers Trilogy* guidelines are statutorily imposed on the FLRA under 5 U.S.C. § 7122(a)(2) and the FLRA violates this statutory limitation on its review authority, the *Steelworkers Trilogy* opinions necessarily affect federal court jurisdiction.

rule, or regulation; or (2) **on other grounds similar to those applied by Federal courts in private sector labor management relations**." 5 U.S.C. § 7122(emphasis added). This limited framework of authority is further restricted in that the FLRA's actions and recommendations upon an arbitration decision must be, "consistent with applicable laws, rules, or regulations." 5 U.S.C. § 7122.

The FLMRA went into effect nearly twenty (20) years after the *Steelworkers Trilogy* and expressly limits the FLRA's review power of arbitration awards on, "grounds similar to those applied by Federal courts in private sector labor-management relations." 5 U.S.C. § 7122. This language is particularly important when matched with the language of the legislative debates leading up to the creation of the FLMRA, which show Congress' clear intention was to severely limit the FLRA's authority to review arbitration decisions and to hold such limitations in line with the federal courts' limitations found in the *Steelworkers Trilogy*. In framing the FLMRA, Congress declared that:

> The Authority will only be authorized to review the award of the arbitrator on very narrow grounds similar to the scope of judicial review of an arbitrator's award in the private sector. In light of the limited nature of the Authority's review, the conferees determined it would be inappropriate for there to be subsequent review by the court of appeals in such matters.

H.R. Conf. Rep. No. 1717, 95th Cong., 2nd Sess. 153 (1978). Upon reviewing this statutory history, it is clear that Congress restricted the right of appeal under § 7123 of the Act because under § 7122, the FLRA itself was restricted in its authority to review arbitrators' decisions when drawn from the essence of the collective bargaining agreement.

2. Split in the Circuits

a. District of Columbia Circuit

The District of Columbia Circuit has analyzed the Civil Service Reform Act and held that the policies favoring extremely limited judicial review of arbitrators' decisions are fully applicable in the federal sector. *Devine v. White*, 697 F.2d 421, 440 (D.C. Cir. 1983) *overruled on other grounds by, Cornelius v. Nutt*, 472 U.S. 648, 662 (1985). The District of Columbia Circuit tracked the history of private sector and federal sector arbitration through the application of the *Steelworkers Trilogy* and concluded that, "the possible grounds for treating arbitral decisions in the federal sector less deferentially than private sector decisions cannot withstand careful scrutiny." *Id.* at 439. The District of Columbia explained further that while limited review of arbitral decisions has been granted by Congress, this was done in an effort to promote uniformity of process and adequately protect the rights of government employees, but consistent with private sector precedent, Congress has done so in a manner that, "leaves arbitrators' interpretations of collective bargaining agreements themselves largely unreviewable." *Id.* at 440.

The District of Columbia Circuit has further tracked the implications of the *Steelworkers Trilogy* in its subsequent holdings. In *United States Dept. Of Justice v. FLRA*, the District of Columbia Circuit recognized the importance of arbitration to the scheme established by the FLMRA, that accords to the FLRA "extremely limited" review of those arbitral awards that it has jurisdiction to review. *United States Dept. of Justice v. FLRA*, 981 F.2d 1339, 1344, n.2 (D.C. Cir. 1993), citing to *Devine* at 436, relying on *Steelworkers*, 363 U.S. at 597. The District of Columbia applies this same analysis in *United States Dept. of Treasury v. United States Customs Service*, holding that the merits of an arbitrator's award that implicates the collective bargaining

agreement are "absolutely immune from judicial review," and if the party's exception to the arbitral award is not one of law, but of contract, the FLRA's role is limited to that of the federal courts in private sector labor-management relations as found in the *Steelworkers Trilogy*. *United States Dept. of Treasury, Customs Service v. F.L.R.A.*, 43 F.3d 682, 686-687 (D.C. Cir. 1995)(hereinafter, "*Customs*"), citing to 5 U.S.C. §7122(a)(2) and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

b. Fifth Circuit

The holdings of the District of Columbia Circuit, which establish that the FLMRA was created with Congress' intent to incorporate the high level of deference for arbitral awards found within the *Steelworkers Trilogy*, are in stark contrast to the Fifth Circuit's holding in this case. The Fifth Circuit, while ignoring Petitioners' statutory history of the FLMRA,[7] states that:

> Appellants cite a series of three Supreme Court opinions, the *Steelworkers Trilogy*, to support the proposition that employment arbitrations are to be given a high degree of deference. The *Steelworkers Trilogy* opinions, however, deal with federal court review of employment arbitration decisions, not federal court review of FLRA decisions. The *Steelworkers Trilogy* opinions do not provide guidance on this court's jurisdiction over FLRA decisions. (App. A, at 9a).

The Fifth Circuit has failed to directly determine to what extent the FLRA is limited in its authority by the *Steel-*

[7] The Fifth Circuit interjects that Petitioners, "do not cite any legislative history," to support the proposition that Congress intended the FLRA's review authority of arbitral awards to track that of the *Steelworkers Trilogy*. Contrary to the Fifth Circuit's statement, Petitioners provided citation to legislative history in both their brief and reply brief before the court.

workers Trilogy guidelines, but by necessary implication, the Fifth Circuit freed the FLRA to depart completely from those guidelines and to liberally overrule the arbitrator's interpretation of a collective bargaining agreement.

The Fifth Circuit cites to the District of Columbia Circuit's decision in *Customs*, 43 F.3d 682, 686-87 (D.C. Cir. 1995) for the proposition that if an arbitrator's award is challenged because it is allegedly contrary to a law, rule or regulation, the FLRA must conduct a *de novo* review. (App. A, at 7a). This misstatement of the *Treasury* holding exemplifies the Fifth Circuit's effort to expand the FLRA's authority to strike down arbitrator's rulings in violation of *Steelworkers Trilogy* principles as set forth in §7122(a)(2). The District of Columbia actually held that "the merits of an arbitrator's collective bargaining agreement are, by virtue of the categorical nature of this provision, absolutely immune from judicial review." *Customs* at 686. Additionally, the Fifth Circuit twists the District of Columbia's precedent further by changing the holding from *de novo* review of the "legal question" to *de novo* review of the arbitrator's interpretation of the collective bargaining agreement. The Fifth Circuit's incorrect analysis of *Customs* evidences the Fifth Circuit's effort to provide more authority to the FLRA than Congress provided under § 7122(a)(2).

Compounding this problem, the Fifth Circuit addresses the limited review of FLRA decisions on arbitral awards (as found in § 7123), yet fails to recognize that the judiciary was given limited review power of FLRA decisions under § 7123 because the FLRA, under § 7122(a)(2) was never intended a scope of review that would affect an arbitrator's decision based upon a collective bargaining agreement. H.R. Conf. Rep. No. 1717, 95th Cong., 2nd Sess. 153 (1978). Currently the FLRA has carte blanc authority to overturn arbitrators' awards that are based upon the arbitrator's interpretation of a collective bargaining agreement and no court within the Fifth

Circuit has the jurisdiction to reverse the FLRA to insure that it complies with its statutory mandate to conduct narrowly limited review of arbitration decisions.

B. The Court Should Grant Certiorari Because the Fifth Circuit has decided an important federal question in a way which conflicts with relevant decisions of this Court in the *Steelworkers Trilogy* and *Leedom v. Kyne.*

The Fifth Circuit's holding in *AFGE 1617* conflicts with this Court's decisions in both the *Steelworkers Trilogy* and *Leedom.* While it is undisputed that *Leedom* jurisdiction is a narrow exception to a general preclusion of judicial review, it is a necessary exception. The Fifth Circuit has strained to further restrict the exception by ruling that the *Steelworkers Trilogy* (which according to the District of Columbia Court of Appeals, restricts the FLRA's scope of review of arbitration awards per statue) does not relate to jurisdiction. Nothing in *Leedom* suggests that a federal agency is free from *Leedom* jurisdiction when it exceeds its authority in this manner.

In analyzing this Court's *Leedom* precedent, the Fifth Circuit reviewed *Leedom*, *Boire v. Greyhound Corporation*, and *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.* (*MCorp*)[8] and held that *Leedom* jurisdiction does not exist when there is evidence of congressional intent to deny district court review, the statute provides an adequate opportunity for judicial review, and the action of the agency did not plainly violate an unambiguous and mandatory statutory provision. (App. A, at 5a). This is flawed analysis. The act at issue in *MCorp*, the Financial Institutions Supervisory Act (FISA), has an *express* preclusion of judicial review. FISA states that, "no court shall have jurisdiction to

---

[8] *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964); *Board of Governors of the Fed. Reserve v. MCorp Financial Inc.*, 502 U.S. 32 (1991).

affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order." *MCorp* at 39. Contrasted with the FISA preclusion, 5 U.S.C. § 7123(a)(1) is anything but an express preclusion of judicial review. Another reason *MCorp* held that *Leedom* jurisdiction did not apply was because FISA allowed a meaningful and adequate opportunity for judicial review through future avenues the petitioners in *MCorp* had not yet explored. *MCorp* at 43-44.

The Fifth Circuit's application of *MCorp* to the FLMRA, a statute with no *express* preclusion of judicial review and no meaningful and adequate opportunity for judicial review through future avenues[9], extinguishes *Leedom* jurisdiction in its entirety. If the Fifth Circuit is allowed to cast *MCorp* as a bar to judicial review in cases where a statute merely implies preclusion *and* provides no meaningful and adequate opportunity for judicial review, then *Leedom*, with its emphasis on the ability of the judiciary to protect of rights granted by Congress, is completely foreclosed. *Leedom* at 188-191. Granting certiorari will allow the Court to prevent *MCorp* from becoming a total bar to the application of *Leedom*.

The Fifth Circuit's application of *Leedom* eviscerates the reason the *Leedom* doctrine exists, to strike down an act of an agency made in excess of the authority that agency was given

---

[9] Not only does the FLMRA not provide a meaningful and adequate opportunity for judicial review, it has been held that a federal employee's attempt to access the courts prior to bringing a grievance and arbitration is a failure to exhaust arbitration rights. *Suzal v. Director, United States Information Agency*, 32 F.3d 574, 578 (D.C. Cir. 1994). Under the FLRA's scheme, per the Fifth Circuit holding, federal employees are barred from the courts both before and after their rights have been violated.

by Congress. *Leedom* at 188-189. While *Leedom* is narrow and rarely applied, its essential holdings have not been altered by this Court. *Leedom* holds:

> This suit is not one to "review," in the sense of that term as used in the Act, a decision the Board made within its jurisdiction. Rather, it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. Section 9(b)(1) is clear and mandatory. . . . Yet the Board included in the unit professional employees, after refusing to determine whether a majority of the professional employees would "vote for inclusion in the unit." Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a "right" assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.

Leedom at 188-189. The Fifth Circuit, in holding that the *Steelworkers Trilogy* has no bearing on § 7122(a)(2), and in holding that the FLRA's actions in this case do not meet the standards of *Leedom*, has limited this Court's *Leedom* doctrine to its particular facts. In this case, the FLRA clearly violated § 7122(a)(2) when it overturned the Arbitrator's interpretation of the parties' MLA despite the fact that 5 U.S.C. § 7122 restricts the FLRA's authority to review in line with the Federal Courts per the *Steelworkers Trilogy*. Here too, the FLRA's actions have deprived the Plaintiffs of their rights as given to them by Congress under the FLMRA and they have no subsequent course of action to regain that right other than seek protection in a federal court. The Fifth Circuit's erosion of the *Leedom* doctrine ignores obvious application of *Leedom* to this case. A casting of this case in the words of *Leedom* could be paraphrased as follows:

> This suit is not one to "review," in the sense of that term as used in the Act, a decision the **Authority** made within

> its jurisdiction. Rather, it is one to strike down an order of the **Authority** made in excess of its delegated powers and contrary to a specific prohibition of the Act. Section **7122(a)(2)** is clear and mandatory . . . . Yet the **Authority reviewed an arbitrator's award on the merits, substituting its interpretation of a collective bargaining agreement for that of the arbitrator.** Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the **parties to the collective bargaining agreement** of a "right" assured to them by Congress. Surely in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.[10]

Furthermore, in applying *Boire*, to this case, the Fifth Circuit continues to curtail *Leedom* jurisdiction in that the Fifth Circuit stretches *Boire*, which did not involve a violation of § 7122(a)(2), into meaning that any error by an agency which can be couched as a "factual error" does not fall under the *Leedom* exemption. *Boire*'s application to the *Leedom* doctrine must be specifically tied to the facts of *Boire* and not made into a free pass for any agency that claims to merely have made "factual errors." The important difference between *Boire* and the present case, which the Fifth Circuit ignores, is that under the FLMRA, the FLRA was not given the authority to reinterpret the arbitrator's determination of the meaning of the parties' collective bargaining agreement,

---

[10] This is a paraphrase of direct language from *Leedom* with the only changes being marked in bold, substituting precisely the facts and issues of the present case for those in *Leedom*. This language underscores the importance to federal labor principles and the parallel between Petitioner's effort to obtain relief in the federal courts (starting at the district level) where the FLRA has substituted its interpretation of the MLA for that of an arbitrator with the relief a party in the private sector would seek at the circuit court level if a federal district court overstepped its *Steelworkers Trilogy* review authority in overturning an arbitration award. *See, e.g. United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987).

and therefore, any alleged "factual errors" made by the FLRA were necessarily made after the FLRA had undertaken a review of the arbitrator's interpretation of the collective bargaining agreement, and hence were made in excess of the FLRA's authority.

C. The Court Should Grant Certiorari Because the Fifth Circuit's Holding that the *Steelworkers Trilogy* opinions do not provide guidance on its jurisdiction over FLRA decisions is an important question of federal law that has not been, but should be, settled by this Court.

This Court has not addressed whether, and to what extent, the *Steelworkers Trilogy* applies to federal sector arbitrations. In this case, the FLRA substituted its interpretation of the parties' collective bargaining agreement for that of the arbitrator's.[11] This violates basic underpinnings of collective bargaining principles as established in the *Steelworkers Trilogy*, principles that should be applicable to federal sector employees with collective bargaining agreements.

In both private sector and public sector labor law, it is axiomatic that an arbitrator's interpretation of a collective bargaining agreement is near sacrosanct and cannot be overturned when the decision draws its essence from the collective bargaining agreement. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). The *Steelworkers Trilogy* emphasizes the balance of bargaining power in labor relations and the importance of arbitration decisions by holding that if arbitration awards were reviewed for errors, based upon the arbitrator's interpretation of the collective bargaining agreement, the

---

[11] Regardless of the jurisdiction question, this is a disputed issue of fact on which the district court and the Fifth Circuit were obligated under Fed. R. Civ. P. 12(b)(1) to take Petitioners' alleged facts as true. *Saraw Partnership v. United States*, 67 F.3d 567, 569 (5th Cir. 1995).

finality provisions of arbitration agreements would be rendered meaningless and the bargained for arbitration would become worthless. *Id.* at 599, citing to *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); and *see United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). This Court held that parties to a collective bargaining agreement have bargained for the arbitrator's interpretation of the agreement, not the court's, or as in this case, two of three federal agency members. *Id.*

In the private sector this Court provided a powerful example of its commitment to protect arbitrators' decisions in *United Paperworkers v. Misco, Inc.*, 484 U.S. 29, (1987) (*Misco*). In *Misco*, a paper mill in Louisiana terminated an employee after he was arrested for possession of marijuana at his home for possession in his car on plant premises after the police observed the employee and two other men in the car smoking marijuana during the employee's break. *Id.* at 32-34. The employee's union grieved the termination. The arbitrator, based on his interpretation of the parties' collective bargaining agreement, determined that the company did not have just cause at the time of the employee's termination and granted reinstatement with full back pay. *Id.* The Company filed suit in district court to overturn the arbitrator's decision claiming on public policy grounds that an employer must be able to fire an employee for smoking marijuana on plant premises for safety reasons. *Id.* at 34-35. The district court and the Fifth Circuit agreed. These federal courts reviewed the facts of the arbitration and came to a different conclusion than the arbitrator. *Id.* This Court, citing the *Steelworkers Trilogy*, reinstated the arbitrator's decision with the following language which emphasizes the finality and unreviewability

of arbitrator's decisions when based on the collective bargaining agreement:

> The courts **are not authorized** to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract.

Id. at 36.

> Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment **and all that it connotes** that was bargained for. . . .
>
> The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, **or determining whether there is particular language in the written instrument which will support the claim**. . . .

Id., citing Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960)(emphasis added).

> To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract. The arbitrator may not ignore the plain language of the contract; but **the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract.** *Enterprise Wheel, supra*, 363 U.S. at 599, 80 S.Ct. at, 1362. So, too, where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have **no authority to disagree with his honest judgment** in that respect. . . .

> **[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision. . . .**

Misco at 38; citing *Steelworkers v. Enterprise Wheel*, 363 U.S. 593, 596, 597, and 599 (1960); and *Steelworkers v. American Mfg., Co.*, 363 U.S. 564, 567-568 (1960)(emphasis added). *Misco* makes unmistakably clear that the 1960 opinions in the *Steelworkers Trilogy* are fully intact and are unsinkable doctrines of labor law in this country even when confronted by the troubling fact pattern of *Misco*. In the face of the articulate and reasoned decision of Arbitrator Smith and the powerful dissent of Member Pope of the FLRA, this Court's language in *Misco* about an "arbitrator even arguably construing or applying the contract" leaves no wiggle room for the FLRA majority if the *Steelworkers Trilogy* applies in the federal sector.

While the *Steelworkers Trilogy* was based on private sector labor law, the reverence for arbitrators' interpretations of collective bargaining agreements has carried over into all aspects of public sector labor relations. *Elkouri & Elkouri,* the leading authority on arbitration, states that the FLRA may not rule on questions of contract interpretation made by the arbitrator. *Elkouri & Elkouri, How Arbitration Works*, 1300, (Ruben ed., 6th ed. 2003). This is the same level of deference given to private sector arbitrator rulings under the *Steelworkers Trilogy*. The Elkouri text (now wrong in the Fifth Circuit as a practical matter, because if the FLRA exceeds its authority the federal courts lack jurisdiction to act) teaches that federal sector arbitral awards may not be overturned merely because of disagreement with the arbitrator's findings of fact, reasoning, and conclusion, or conclusions drawn from the evidence. *Elkouri* at 1301.

Despite the carte blanche the FLRA now enjoys in the Fifth Circuit, the FLRA itself, not long ago, tracked the language of the *Steelworkers Trilogy* by holding that, "the interpretation of the collective bargaining agreement is a matter solely for the arbitrator because it is the arbitrator's construction of the agreement for which the parties have bargained." *United States Dept. of Health and Human Services v. AFGE Council 147*, 38 FLRA 1183, 1188 (1990). The FLRA has explicitly referenced the *Steelworkers* standard relied upon in *Misco*, when the FLRA held, "as long as an arbitrator is even arguably construing the collective bargaining agreement, that a court is convinced that the arbitrator committed serious error does not suffice to find the award deficient." *United States Dept. of Labor (OSHA) and National Council of Field Labor Locals*, 34 FLRA 573, 576 (1990).

It would be difficult to conjure a ruling by a United States Circuit Court that could have a more profound and damaging, national impact than this decision by the Fifth Circuit Court of Appeals. Not only does federal labor policy favor the sanctity of arbitration awards, but federal labor policy favors arbitration. This decision, which treats arbitration awards in the federal sector as inferior to those in the private sector (because they may be freely overturned), is at odds not only with the *Steelworkers Trilogy*, but also with the holdings of the District of Columbia Court of Appeals and earlier more reasoned decisions of the FLRA itself. This decision undercuts federal policy favoring arbitration, a policy furthered by this Court's rulings in *Circuit City Stores v. Adams*, 532 U.S. 105 (2001) and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Arbitration is not a viable or fair substitute for litigation (or for concerted activity by unions) where arbitration awards are not protected by the doctrine this Court announced in 1960 in the *Steelworkers Trilogy*.

CONCLUSION

For all the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HAL K. GILLESPIE *
GILLESPIE, ROZEN, WATSKY,
& MOTLEY, P.C.
3402 Oak Grove Avenue, Suite 200
Dallas, Texas 75204
(214) 720-2009

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 03-51264
Summary Calendar

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1617; Arthur Celestino; American Federation of Government Employees, Council Number 214,
Plaintiffs-Appellants,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Defendant-Appellee.

Decided June 29, 2004.

Before HIGGINBOTHAM, DAVIS and PRADO, *Circuit Judges*.

PER CURIAM:*

Appellants, the American Federation of Government Employees Local 1617 ("Local 1617"), Arthur Celestino, and American Federation of Government Employees Council Number 214 ("Council Number 214"), sued the Federal Labor Relations Authority ("FLRA") in district court, alleging that the FLRA exceeded its authority in overruling an arbitration decision. Appellants' suit was dismissed for lack

---

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

of subject matter jurisdiction. For the following reasons, this court AFFIRMS the district court's judgment dismissing Appellants' lawsuit.

Background

Local 1617 and Council Number 214 represent employees of the United States Department of the Air Force, San Antonio Air Logistics Center, Kelly Air Force Base, San Antonio ("Agency"). Appellant Celestino was an employee of the Agency. At all relevant times, relations between Appellants and the Agency were covered by the Master Labor Agreement ("MLA"). In April 1999, employees of the Agency, who were represented by Local 1617, brought a grievance against the Agency alleging that they were entitled to Environmental Differential Pay ("EDP") because of exposure to asbestos. The Agency denied the grievance.

Local 1617 invoked arbitration, as authorized by the MLA. After a lengthy arbitration, the arbitrator ruled that the employees were entitled to limited EDP.

Appellants and the Agency filed exceptions to the arbitration award with the FLRA, under 5 U.S.C. § 7122. The FLRA is an independent agency whose responsibilities include resolving exceptions to arbitration awards. The FLRA set aside the arbitration award, finding that the award was deficient. Appellants moved for reconsideration. The FLRA denied that motion.

Appellants sued FLRA, alleging that FLRA had violated the Federal Labor Management Relations Act[1] when it overturned the arbitrator's decision. FLRA moved under Fed.R.Civ.P. 12(b)(1) to dismiss for lack of subject matter jurisdiction. Appellants moved for summary judgment. The district court granted FLRA's Rule 12(b)(1) motion, denied

---

[1] 5 U.S.C. § 7101 *et seq.*

Appellants' motion for summary judgment, and entered a judgment dismissing Appellants' lawsuit. Appellants timely appealed.

Discussion

Standard of review

This court reviews *de novo* the grant of a Rule 12(b)(1) motion.[2] The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction;[3] in this case, the Appellants. A Rule 12(b)(1) motion may be granted only when it appears certain that the plaintiffs cannot prove any set of facts in support of their claim that would entitle them to relief.[4] For purposes of analyzing a Rule 12(b)(1) motion this court takes the plaintiff's alleged facts as true.[5]

Jurisdiction to review FLRA decisions

The FLRA may change an arbitrator's award if it finds the award is deficient: "(1) because it is contrary to any law, rule or regulation; or (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations."[6] There is no statutory provision providing for review of the FLRA's decisions on arbitration awards.[7] Appellants argue that despite the lack of a provision for federal court review of the FLRA's decisions, the district

---

[2] *Hebert v. United States*, 53 F.3d 720, 722 (5th Cir.1995).

[3] *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936).

[4] *Benton v. United States*, 960 F.2d 19, 21 (5th Cir.1992).

[5] *Saraw Partnership v. United States*, 67 F.3d 567, 569 (5th Cir.1995).

[6] 5 U.S.C. § 7122(a).

[7] As a general matter, parties may seek review of FLRA decisions in federal courts of appeals. 5 U.S.C. § 7123(a). However, they may not seek review of final FLRA decisions about arbitrator's awards unless the order involves an unfair labor practice. *Id.*

court had jurisdiction to hear this case under the Supreme Court's decision in *Leedom v. Kyne*.[8]

In *Leedom*, a group of professional employees objected to a decision of the National Labor Relations Board ("NLRB") that combined professional and non-professional employees into one bargaining unit.[9] The employees sued the NLRB in district court, alleging that the NLRB had violated a National Labor Relations Act provision explicitly prohibiting such combinations without prior approval of the professional employees.[10] The district court found that jurisdiction existed, and the circuit court affirmed that decision.[11] The Supreme Court also affirmed jurisdiction, finding that the NLRB had acted "in excess of its delegated powers and contrary to a specific prohibition in the [National Labor Relations Act]."[12] The Court reasoned that if it found jurisdiction did not exist, then the rights of the professional employees would be sacrificed, and that "where, as here, Congress has given a 'right' to the professional employees it must be held that it intended that right to be enforced. . . ."[13]

This exception, however, is very narrow. In *Boire v. Greyhound Corporation*, the plaintiffs attempted to challenge a NLRB finding that independent contractors were employees of the hiring corporation, despite a National Labor Relations Act statute excluding independent contractors from the definition of employee.[14] In *Boire*, the Supreme Court held

---

[8] 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at 184, 79 S.Ct. 180.

[13] *Id.* at 185, 79 S.Ct. 180.

[14] 376 U.S. 473, 84 S.Ct. 894, 11 L.Ed.2d 849 (1964).

that deciding whether someone met the definition of employee was a factual question and that there was no federal jurisdiction to review such a decision.[15] The Court explained that the *Leedom* exception is a narrow one, not to be extended to permit plenary district court review of [NLRB] orders . . . whenever it can be said that an erroneous assessment of the particular facts before the [NLRB] has led it to a conclusion which does not comport with the law.[16]

In *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*, the Supreme Court held that jurisdiction existed to review an agency action alleged to have exceeded the agency's statutory authority.[17] The Supreme Court found that there was no jurisdiction where the agency's authorizing statute indicated a congressional intent to deny district court review, and the statute provided a meaningful and adequate opportunity for judicial review.[18]

This court has analyzed the *Leedom* exception and explained that it is "narrow and rarely used."[19] Further, the exception should be used to correct only egregious error, and does not allow federal courts to review whether an agency responsible for implementing a statute has misinterpreted that statute.[20] Instead, the *Leedom* exception allows jurisdiction "only in a very narrow situation in which there is a plain violation of an unambiguous and mandatory provision of the statute."[21] Appellants argue that the FLRA decision fits into this narrow category of violations. Under the *Leedom* ex-

---

[15] *Id.*

[16] *Id.* at 481-481, 84 S.Ct. 894.

[17] 502 U.S. 32, 112 S.Ct. 459, 116 L.Ed.2d 358 (1991).

[18] *Id.*

[19] *Russell v. Nat'l Mediation Bd.*, 714 F.2d 1332, 1340 (5th Cir.1983).

[20] *Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 292 (5th Cir.1999).

[21] *Herman*, 176 F.3d at 293.

ception, jurisdiction will exist only if FLRA plainly violated unambiguous and mandatory statutory provisions.[22] As explained below, Appellants have not shown that the FLRA's decision violated any statutory provision.

Propriety of the FLRA decision under 5 U.S.C. § 7122(a)(2)

Appellants contend that the FLRA violated 5 U.S.C. § 7122(a)(2) by overturning an arbitrator's award. Specifically, Appellants argue that FLRA should have given special deference to the arbitration award because it was based on the arbitrator's interpretation of a collective bargaining agreement.

Section 7122 provides that:

> (a) Either party to arbitration under this chapter may file with the [FLRA] an exception to any arbitrator's award pursuant to the arbitration. . . . If upon review the [FLRA] finds that the award is deficient—
>
> > (1) because it is contrary to any law, rule, or regulation; or
> >
> > (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;
>
> the [FLRA] may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

The FLRA found that the award was deficient because it was contrary to law. The FLRA maintains that while it overturned the arbitrator's legal conclusions, it deferred to the arbitrator's findings of fact. Pursuant to § 7122(a)(1), the FLRA is authorized to change an arbitrator's award if the

---

[22] *See id.*

FLRA finds the award is contrary to any law, rule, or regulation.[23] In fact, the District of Columbia Circuit has held that if an arbitrator's award is challenged because it is contrary to a law, rule or regulation, the FLRA must conduct a *de novo* review.[24]

The FLRA decision references the arbitrator's findings that the parties to arbitration had not agreed to a specific standard for entitlement to EDP. Based on this finding, the arbitrator concluded that there was a conflict between the Agency's regulations and the MLA between the parties. The arbitrator next held, as required when a regulation conflicts with a labor agreement,[25] that the regulation could not be applied. The FLRA decision does not challenge the arbitrator's finding that the MLA did not specify an EDP threshold. Rather, FLRA contends that the arbitrator was wrong to dismiss the Agency's regulations when the MLA did not present any regulations of its own that could have conflicted with the Agency's regulations.

In response, Appellants argue that the lack of an agreement on specific regulations means that the threshold for EDP was to be set on a case-by-case basis. To support this point, they quote the arbitrator's finding that the Union representing the Agency employees specifically bargained to avoid including an EDP threshold in the MLA, so that EDP could be awarded on a case-by-case basis. Contrary to Appellants' assertions, however, this finding relates to the Union's bargaining position, not the binding final product of that bargaining—the MLA. Appellants do not cite any requirement in the MLA that EDP is to be determined on a case-by-case basis, nor do

---

[23] *U.S. Dep't of Treasury v. Fed. Labor Relations Auth.*, 43 F.3d 682, 686-87 (D.C.Cir.1994).

[24] *Id.* at 686-87.

[25] *See U.S. Dep't of the Army, Ft. Campbell Dist., Third Region, Ft. Campbell, Ky.*, 37 FLRA 186, 195, 1990 WL 140089 (1990).

they assert that the arbitrator found such a requirement. The arbitrator's findings about the Union's bargaining goals are irrelevant to determining whether the MLA conflicts with Agency regulations.

Therefore, FLRA did not contradict a factual finding by the arbitrator when it determined that the MLA was silent on the appropriate method of determining EDP. Rather, FLRA applied its own review of the applicable law. The FLRA's binding precedent dictates that in the absence of an agreed-upon regulation the Agency's own regulation governs.[26] Thus, FLRA acted within its authority in determining that Agency regulations govern the assessment of EDP in this case, where there was no other agreement governing that assessment. This court does not have jurisdiction over FLRA decisions that are made pursuant to FLRA's authority.

The FLRA decision and congressional intent

Appellants next contend that congressional intent will be thwarted unless courts have subject matter jurisdiction to review FRLA decisions about arbitration awards. Appellants maintain that without district court review there will be no mechanism to ensure that FLRA does not reach beyond what Congress intended to be its very limited right to alter arbitration awards. Appellants do not cite any legislative history to support this position. Rather, they argue that as a general matter, expedition of dispute resolution and the finality of arbitration decisions would be undermined without district court review of FLRA decisions.

---

[26] U.S. Dep't of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky., 37 FLRA 186, 195, 1990 WL 140089 (1990) (agency rules and regulations "govern the disposition of matters to which they apply . . . when the rules and regulations do not conflict with provisions of an applicable collective bargaining agreement").

Appellants cite a series of three Supreme Court opinions, the *Steelworkers Trilogy*,[27] to support the proposition that employment arbitrations are to be given a high degree of deference. The *Steelworkers Trilogy* opinions, however, deal with federal court review of employment arbitration decisions, not federal court review of FLRA decisions. The *Steelworkers Trilogy* opinions do not provide guidance on this court's jurisdiction over FLRA decisions. Instead, this court must rely on the statutory language that specifically explains when review is appropriate.

Appellants' argument about congressional intent is unconvincing in light of the statutory scheme surrounding the FLRA. Congress explicitly provided for review of FLRA decisions under 5 U.S.C. § 7123. This provision also prohibits review when the FLRA decision involves an order by an arbitrator, unless the order involves an unfair labor practice. Section 7123 evidences Congress's intent that only certain FLRA decisions should be reviewed. There is no reason to assume a different congressional intent from that stated on the face of the statute. Therefore, this court finds it does not have jurisdiction to hear this case based on congressional intent.

Propriety of the FLRA decision under 5 U.S.C. § 7101

Lastly, Appellants argue that the FLRA decision under0 mined all collective bargaining and therefore violated 5 U.S.C. § 7101. This argument essentially reiterates Appellants' argument asserting that the FLRA violated 5 U.S.C. § 7122. Appellants contend that the FLRA undermined collective bargaining by replacing an agreed-upon rule with a

---

[27] *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960).

rule created by an agency. As discussed above, there is no evidence that the MLA included a rule specifying when to award EDP pay, nor did the arbitrator conclude that there was such a rule. Therefore, Appellants' argument that an agreed-upon rule was ignored fails. There is no jurisdiction for this court to hear this appeal based upon a violation of 5 U.S.C. § 7101.

Conclusion

Appellants fail to demonstrate that FLRA plainly violated a mandatory and unambiguous statutory provision. Accordingly, the district court correctly found that it lacked subject matter jurisdiction over the dispute and dismissed the case under Rule 12(b)(1). Therefore, this court AFFIRMS the district court's judgment dismissing Appellants' lawsuit.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT,
W.D. TEXAS, SAN ANTONIO DIVISION

No. Civ.A.SA-03-CA-58-FB

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1617, Arthur Celestino, and American Federation of Government Employees, Council Number 214,
Plaintiffs,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Defendant.

Oct. 21, 2003

Michael Putman, Putman & Putman, San Antonio, TX, *Hal Keith Gillespie*, Gillespie, Rozen, & Watsky, P.C., Dallas, TX, for Plaintiffs.

Raymond A. Nowak, U.S. Attorney's Office, San Antonio, TX, *William R. Tobey*, David M. Smith, Office of the Solicitor, *James F. Blandford*, Federal Labor Relations Authority, Washington, DC, for Defendant.

ORDER ACCEPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

BIERY, J.

Before the Court is the Report and Recommendation of the United States Magistrate Judge (docket no. 25) and plaintiffs' written objections thereto (docket no. 29).

Where no party has objected to a Magistrate Judge's Report and Recommendation, the Court need not conduct a de novo review of the Report and Recommendation. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). In such cases, the Court need only review the Report and Recommendation and determine whether it is clearly erroneous or contrary to law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir.), *cert. denied*, 492 U.S. 918, 109 S.Ct. 3243, 106 L.Ed.2d 590 (1989).

On the other hand, any Report and Recommendation to which objection is made requires de novo review by the Court. Such a review means that the Court will examine the entire record, and will make an independent assessment of the law. The Court need not, however, conduct a de novo review when the objections are frivolous, conclusive, or general in nature. *Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir.1987).

The Court has thoroughly analyzed the plaintiffs' submission in light of the entire record. As required by Title 28 U.S.C. § 636(b)(1)(c), the Court has conducted an independent review of the entire record in this cause and has conducted a *de novo* review with respect to those matters raised by the objections. After due consideration, the Court concludes plaintiffs' objections lack merit.

This case involves the interpretation of statutes governing an administrative process which is similar to the substantial evidence rule applied in social security cases. At the threshold, plaintiffs argue the report erroneously recommends applying the wrong standard of review. Consistent with plaintiffs' arguments, the report does recommend that the Court accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of plaintiff. The first amended complaint itself is approximately two inches in

thickness, containing six attachments, A through F, which include: the Master Labor Agreement between the AFGE and the Air Force Material Command; the October 9, 2001 decision of the arbitrator; the April 7, 2002 supplemental order and attached time billing statement; the September 11, 2002 orders of the Authority; September 11, 2002 statement of service by the Authority and November 13, 2002 order denying the request for reconsideration by the Authority; and November 13, 2002 statement of service by the Authority. Pursuant to settled law, these attachments were and are considered to be part of the first amended complaint when accepting as true the factual allegations of the complaint and construing them in the light most favorable to plaintiffs. *See* Fed. R. Civ. P. 10(c); *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996).[1] The Magistrate Judge reviewed all the submissions of all parties in preparing a report on subject matter jurisdiction, as did this Court, in informing itself as to the issues plaintiffs were presenting to the Court for resolution on the merits.

---

[1] Few other evidentiary materials were submitted by the parties on their cross-motions. Defendant's motion to dismiss or for summary judgment appends only the three decisions of the Authority at issue, as they appear in the Authority's reporter, 58 FLRA Nos. 13, 14 and 47 (Sept. 11, 2002 and Nov. 13, 2002) (docket no. 3, attachments). Defendant also submitted a statement of material facts not in dispute (docket no. 4). Plaintiffs' response to defendant's motion and plaintiffs' cross-motion for summary judgment append virtually identical affidavits from Mr. Joseph A. Gillespie, an attorney for plaintiffs, in which plaintiffs incorporate by reference all exhibits to the first amended complaint (docket no. 9, attachment; docket no. 21, attachment). Defendant's response to plaintiffs' cross-motion forwards OPM Compensation and Leave Decision, Case No. S001371 (May 12, 1998), in support of defendant's argument that, contrary to plaintiffs' argument that the Authority's decision and its reliance on the Agency's regulation usurps the authority of OPM, provides that specific judgments as to EDP entitlements are left to the discretion of the individual agencies (docket no. 16).

Plaintiffs assert that the report "fails to analyze the Arbitrator's Award and Opinion" (objections at 9) or other key pieces of evidence submitted by plaintiffs through the first amended complaint. Substantive issues presented by the parties were considered to the extent they related to an assessment of subject matter jurisdiction. It is not necessary for the report to discuss all of those facts when it identifies the aspects of the parties' disputes material to a resolution of subject matter jurisdiction. The arbitrator's first decision, for example, numbers more than 200 pages. Indeed, plaintiffs' objections to the report, which numbers 43 pages, arguably contains little analysis of the arbitrator's decisions, yet is sufficient to state the bases of plaintiffs' strongly differing views on the determination of no jurisdiction.

Analogously, plaintiffs assert that "the Court must determine the merits of plaintiffs' claims in order to decide whether or not *Leedom v. Kyne* jurisdiction exists" (objections at 16). Citing *Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir. 1981), plaintiffs argue that when a "defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action is for the district court is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of plaintiffs' case" (objections at 17).[2] But, in this case, under

---

[2] In *Williamson,* the issue was whether joint venture interests and notes were "securities" within the meaning of the Securities Act of 1933 and the Securities and Exchange Act of 1934. The district court dismissed the case for lack of subject matter jurisdiction, with minimal explanation that the documents at issue were not "securities," the matter in dispute, 645 F.2d at 407, 410. The Fifth Circuit reversed the dismissal for lack of subject matter jurisdiction noting: "In this case it is clear that the jurisdictional issue reaches the merits of plaintiff's case; if the joint venture interests and notes are not securities, there is not only no federal jurisdiction to hear the case but also no federal cause of action on the stated facts." *Id.* at 416. The Fifth Circuit concluded that plaintiffs' claims "are not so clearly immaterial or insubstantial as to justify their dismissal . . . ." *Id.* at 429.

the general rule of 5 U.S.C. § 7123, there is no subject matter jurisdiction in this Court over plaintiffs' claims unless the "narrow and rarely used"[3] exception set out in *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958), applies. *Williamson* does not deal with the situation governed by *Kyne* and does not address the determination of whether an exception to a general lack of subject matter jurisdiction exists. Further, although defendant did move to dismiss under both Rules 12(b)(1) and (6), the basis of its motion to dismiss for failure to state a claim was lack of subject matter jurisdiction; the report recommends dismissal based on a lack of subject matter jurisdiction. Neither defendant's motion to dismiss nor the report ultimately speak to the issue of whether plaintiffs have or could state a federal cause of action, only that the Court lacks subject matter jurisdiction over the claims asserted.[4] But, the report does conclude plaintiffs have not demonstrated the Authority acted in excess of its statutory powers, violated a clear mandate of its own enabling statute, and made an "egregious error," a finding necessary for subject matter jurisdiction. To make a finding of no egregious error, the Court necessarily was required to analyze fully plaintiffs' claims and arguments. Nevertheless, even if under *Williamson* this Court is required to consider the merits of plaintiffs'

---

[3] *Russell v. National Mediation Bd.*, 714 F.2d 1332, 1340 (5th Cir. 1983) (quotation omitted), *cert. denied sub. nom. Brotherhood of Ty, Airlines and S.S. Clerks, Freight Handlers, Express & Station Handlers v. Russell*, 467 U.S. 1204, 104 S.Ct. 2385, 81 L.Ed.2d 344 (1984).

[4] For example, a claim of an unfair labor practice likely would state a claim for relief. Similarly, a claim arising under the United States Constitution might state a claim for relief. *See National Treasury Employees Union v. FLRA*, 112 F.3d 402, 404 (9th Cir. 1997) ("The House Conference Report [to § 7123] notes that unless a decision relates to an unfair labor practice, 'decisions of the Authority are final and conclusive and not subject to further judicial review except for questions arising under the Constitution.'") (citation omitted). Plaintiffs' first amended complaint does not allege an unfair labor practice or a claim arising under the Constitution.

claims when deciding subject matter jurisdiction to unspecified degree greater than that already undertaken, plaintiffs do not show how such further consideration of the merits of their claims demonstrates the existence of subject matter jurisdiction. If, as plaintiffs request, the Court simply finds jurisdiction to exist and deals with defendant's objections as an attack on the merits of plaintiffs' case, the *Kyne* exception would swallow the general rule of no jurisdiction. Virtually any plaintiff who seeks to appeal a final FLRA decision presumably would have asserted a claim on the merits as to why the Authority's decision should be set aside or modified and any such claim could be said to be intertwined with the assessment of whether an egregious error, sufficient to invoke the *Kyne* exception, existed. This Court has fully informed itself as to plaintiffs' claims and the parties' contentions to determine if the *Kyne* exception has been satisfied. To that extent, the Court has considered the merits of plaintiffs' claims and in the process has viewed all factual allegations in the first amended complaint and its attachments viewed as true.[5] However, once the Court decides it lacks subject matter jurisdiction, no further determination of the merits of the dispute is undertaken nor, absent jurisdiction, is appropriate.

At the center of plaintiffs' objections are their arguments that the report misapplies the *Kyne* exception. It is clear that section 7123 generally precludes District Courts from review-

---

[5] If, as plaintiffs urge, the merits of plaintiffs' claims are so intertwined with the determination of jurisdiction that they must be considered in tandem, then the Court is no longer required to accord "'presumptive truthfulness'" to the allegations in plaintiffs' complaint "'and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.'" *Williamson*, 645 F.2d at 413 (citation omitted). As the plaintiffs' summary judgment proof is confined to the attachments to the first amended complaint, *see* note 1 above, no additional evidence would be required to be considered by the Court to grant defendant's companion motions to dismiss for failure to state a claim or for summary judgment.

ing the Authority's decisions on exceptions to an arbitrator's award (unless, for example, an unfair labor practice exists).[6] In *Leedom v. Kyne*, the United States Supreme Court recognized an exception to section 7123's general rule of no jurisdiction if the Authority acted "in excess of its delegated powers and contrary to a specific prohibition in the Act." 358 U.S. at 188-89; *see also Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*, 501 U.S. 32, 34, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). *The Fifth Circuit has stated that, under Kyne,* district courts are accorded jurisdiction "only if the agency's interpretation 'is infused with error which is of a *summa* or *magna* quality as contraposed to decisions which are simply *cum* error. Only egregious error melds the [agency's] decision into justiciability.'" *American Airlines, Inc. v. Herman*, 176 F.3d 283, 292 (5th Cir. 1999) (citation omitted).

Here, the Authority accepted the arbitrator's findings that "'[c]learly, there is no specific standard for entitlement to EDP [abbreviation for "environmental differential pay"] set forth in the contract' and that the parties had not 'agree[d] to a specific standard for entitlement to EDP'" (docket no. 2, exhibit D at 3). The Authority then applied an Agency regulation, that is, a federal regulation within the meaning of section 7122(a), to set the standard for EDP.[7] Plaintiffs have not demonstrated that the Authority's decision to apply a regulatory standard for EDP, when the collective bargaining agreement did not expressly provide any specific standard for

---

[6] By relying on the *Kyne* exception in their objections to the report, plaintiffs appear to concede that the Court lacks subject matter jurisdiction unless the *Kyne* exception applies.

[7] This case seeks review of the FLRA's decision on exceptions to an arbitrator's award, not a direct challenge to the authority of the Agency to promulgate the regulation in question. Nor does this case address any issue relating to the lack of any amendments to the CBA to provide a specific standard for EDP.

EDP (even an express "case by case" standard), was in excess of statutory powers, in violation of a clear mandate of its own enabling statute, or an egregious error. Therefore, the *Kyne* exception is not applicable and this Court lacks subject matter jurisdiction to resolve the merits of plaintiffs' disputes and award the relief sought by plaintiffs.

In sum, 5 U.S.C. § 7123(a) precludes this Court from reviewing the Authority's decision to vacate the arbitration awards at issue in this case. Although the United States Supreme Court in *Kyne* recognized a possible exception to section 7123's preclusion of jurisdiction, plaintiffs have not shown that the Authority acted in excess of its statutory powers, violated a clear mandate of its own enabling statute, or committed an egregious error sufficient to invoke the *Kyne* exception. Therefore, this Court lacks subject matter jurisdiction to resolve the merits of plaintiffs' claims and to award plaintiffs the relief sought. Defendant's motion to dismiss for lack of federal subject matter jurisdiction filed pursuant to rule 12(b)(1) of the Federal Rules of Civil Procedure shall be granted.

IT IS THEREFORE ORDERED that the Report and Recommendation of the United States Magistrate Judge (docket no. 25) is ACCEPTED pursuant to 28 U.S.C. § 636 (b)(1) such that:

(a) Defendant's motion to dismiss (contained within docket no. 3) for lack of subject matter jurisdiction pursuant to rule 12(b)(1) of the Federal Rules of Civil Procedure is GRANTED and plaintiffs' cause of action is DISMISSED;

(b) Defendant's motion to dismiss (contained within docket no. 3) for failure to state a claim pursuant to rule 12(b)(6) of the Federal Rules of Civil Procedure and alternative motion for summary judgment (contained within docket no. 3) are DENIED as MOOT; and

(c) Plaintiffs' cross-motion for summary judgment (docket no. 21) is DENIED.

IT IS FURTHER ORDERED that the above-styled and numbered cause is DISMISSED for lack of subject matter jurisdiction. Motions pending with the Court, if any, are dismissed as moot.

It is so ORDERED.

APPENDIX C

F.L.R.A.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1617 (Union) and UNITED STATES DEPARTMENT OF THE AIR FORCE SAN ANTONIO AIR LOGISTICS CENTER KELLY AIR FORCE BASE SAN ANTONIO, TEXAS (Agency)
0-AR-3469

September 11, 2002

Before the Authority: Dale Cabaniss, Chairman, and Carol Waller Pope and Tony Armendariz, Members[1]

DECISION

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Larry D. Smith filed by both the Agency and the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exception, and the Union filed an opposition to the Agency's exceptions. In addition, the Agency has requested that the Authority permit the parties to present oral argument in support of their positions.

The Union filed a grievance over the Agency's failure to pay unit employees environmental differential pay (EDP). The Arbitrator sustained the grievance and awarded employees backpay. We find that the award is deficient, and we set the award aside.

---

[1] Member Pope's dissenting opinion is set forth at the end of this decision.

II. Background and Arbitrator's Award

The Union filed a grievance over "'the Agency's failure and/or refusal to pay environmental pay (EDP) to the Union's Bargaining Unit employees represented by the Union as a result of asbestos exposure at the Facility [Kelly Air Force Base] since March 9, 1975.'" Award at 97 (quoting the grievance).[2] The Arbitrator sustained the grievance and awarded unit employees backpay.

In sustaining the grievance, the Arbitrator considered the threshold issue of the standard for entitlement to EDP for exposure to asbestos. In particular, the Arbitrator examined whether the parties had agreed to apply the permissible exposure level (PEL) of the Occupational Safety and Health Administration (OSHA) as the standard for entitlement to EDP for exposure to asbestos. He explained the "huge significance" of this issue, as follows:

> If the Agency's position that the parties agreed to use the OSHA PEL as the applicable EDP standard is embraced, the Union's grievance is doomed. While there are occasions of OSHA violations in the history of asbestos use at Kelly [Air Force Base], such episodes are rare and isolated. In fact counsel for the Union . . . admitted that if the case was decided in favor of the Agency insofar as the OSHA PEL being the standard for EDP was concerned, then the Union's fate was sealed to the downside.

Id. at 122.

The Arbitrator first considered whether the parties' collective bargaining agreement provided a standard for the award of EDP for exposure to asbestos. He noted that the agree-

---

[2] Kelly Air Force Base was closed on July 13, 2001. *See* Regional Director's Decision and Order in United States Dep't of the Air Force, Air Force Materiel Command, Kelly Air Force Base, Tex., Case No. DA-RP-01-0005, application for review denied, 57 FLRA 749 (2002).

ment's only specific reference to EDP is contained in Article 26, which provides: "In accordance with Federal Law, Government-wide regulation and this Agreement, an environmental differential will be paid to eligible wage-grade employees who are exposed to hazard or physical hardships." *Id.* at 112 (quoting the agreement). From this reference, the Arbitrator concluded that "[c]learly, there is no specific standard for entitlement to EDP set forth in the contract," *id.*, and that the parties had not "agree[d] to a specific standard for entitlement to EDP," *id.* at 221.

In addition, the Arbitrator considered the claim of the Agency that the bargaining history of the agreement evidences that the parties agreed to the OSHA PEL as the standard for entitlement to EDP for exposure to asbestos. After examining the bargaining history, he found the history insufficient to establish that the parties had agreed to the OSHA PEL as the standard for EDP for exposure to asbestos.

The Arbitrator also considered the claim of the Agency that the conduct of the parties subsequent to the execution of the initial collective bargaining agreement confirms the existence of an agreement to allow the OSHA PEL to govern entitlement to EDP for exposure to asbestos.

In considering this claim, the Arbitrator examined the regulation promulgated by the Air Force Logistics Command (AFLC) (now the Air Force Materiel Command (AFMC)) (the headquarters command of the Agency) on November 3, 1987, entitled "AFLC Supplement to AF Supplement to FPM Supplement 532-1." The regulation stated, in pertinent part, as follows:

> S8-7a(1). AFLC definition of "practically eliminated." Reduction of exposure to unusually severe hazards, physical hardships or unusually severe working conditions to a level consistent with accepted standards (*e.g.* AFOSH standards, AF manuals and regulations, OSHA or other recognized national consensus standards).

As noted by the Arbitrator, the regulation was repromulgated on February 11, 1997, primarily to change the command acronym. AFMC Supplement to AF Supplement to FPM Supplement 532-1 provides, in pertinent part, as follows:

> S8-7a(1). AFMC definition of "practically eliminated." Reduction of exposure to unusually severe hazards, physical hardships or unusually severe working conditions to a level consistent with accepted standards AF instructions, Occupational Health and Safety Administration (OSHA) or other recognized national consensus standards.

The Arbitrator found that the AFLC/AFMC Supplements provide that the OSHA PEL is the standard for entitlement of unit employees to EDP for exposure to asbestos. See Award at 127, 134. However, he ruled that "the manner in which the Agency proceeded insofar as EDP was concerned, is not binding upon the Union, unless the evidence establishes that the Union consented to the standard." *Id.* at 127. In this respect, the Arbitrator found that the evidence failed to support any agreement or acquiescence by the Union to the Agency's use of the OSHA PEL. Apart from this finding, the Arbitrator did not specifically address the effect of the AFLC/AFMC Supplements in this case.

In reviewing the parties' Master Labor Agreement (MLA), the Arbitrator found that "there is no specific standard for entitlement to EDP set forth in the contract." *Id.* at 112. He found that the "words of the MLA were crafted with the apparent intent to incorporate the bargaining objective of the Union to avoid any definition of 'practically eliminated.'" *Id.* at 136-37. As a result of these determinations, the Arbitrator ruled that "there is insufficient evidence to establish that the parties agreed that the OSHA PEL would serve as the trigger point for EDP." *Id.* at 137.

Thereafter, on review of FLRA case precedent, the Arbitrator ruled that in view of his determination that "the

parties did NOT ever agree to a specific standard for entitlement to EDP," he was "left with the responsibility and authority to determine whether the bargaining unit employees . . . are entitled to EDP." *Id.* at 221 (emphasis in original). He stated that his "finding that the parties did not voluntarily consent to the use of the OSHA PEL as the standard for entitlement to EDP, does not necessarily mean that the OSHA PEL should not be the standard adopted by the Arbitrator." *Id.* at 222. However, on review of the record, he rejected the use of the OSHA PEL as the standard. Stating the standard in terms of Appendix A to 5 C.F.R. § 532.511, he found that EDP should be paid to any employee "who works in an area where airborne concentrations of asbestos fibers could possibly result in damage or sickness and safety measures or devices have not essentially removed the possibility of such damage or sickness." *Id.* at 240.

Addressing the issue of remedy, the Arbitrator found that the grievance was untimely, but that the Agency contributed to its untimeliness. For purposes of calculating the appropriate amount of backpay, the Arbitrator "apportion[ed] fault on an 80% and 20% basis." *Id.* at 282. Accordingly, he ruled that "[t]he Union's claim, from 6 years prior to the filing of the grievance until 20 calendar days prior to the filing of the grievance, is discounted to 20%." *Id.* He also found that there were mitigating factors that required a further reduction in the amount of backpay awarded. For this reason, he ruled that "EDP is to be discounted to 50% from 6 years prior to the filing of the grievance until the present." *Id.* at 283.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is deficient on the ground that it is contrary to regulation. In this regard, the Agency contends that "[t]he Arbitrator's conclusion that the OSHA PEL was not the proper level for determining payment

of environmental differential pay is contrary to the standard established by a command-wide agency regulation issued at the level of exclusive recognition." Exceptions at 8. The Agency maintains that "[t]he Arbitrator erred . . . when he failed to recognize the AFMC regulation which defined the level at which asbestos EDP would be paid. Therefore, the Arbitrator's decision is deficient . . . under 5 U.S.C. [§] 7122(a)(1)." *Id.*

The Agency notes that under United States Dep't of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky., 37 FLRA 186 (1990) (Ft. Campbell), an award is deficient when it conflicts with an agency regulation that governs the matter in dispute. The Agency maintains that the AFLC/AFMC Supplements govern the matter in dispute and specify that the OSHA PEL is the standard for entitlement to EDP for exposure to asbestos. In this regard, the Agency contends that the Authority has "made clear that regulations setting levels of exposure that warrant payment of EDP act as a specific limit on an [a]rbitrator's authority to otherwise independently determine such a level[.]" *Id.* at 11, citing AFGE Local 2250, 52 FLRA 320, 323 (1996) ("in the absence of a mandated quantitative level set by applicable law or regulation or otherwise agreed to by the parties, the arbitrator has the authority to determine the threshold quantitative level of exposure for the payment of EDP"). Thus, according the Agency, "it is clear that an AFMC regulation establishing the trigger level of exposure for EDP must be properly recognized and applied by the Arbitrator." *Id.*

In arguing that the AFLC/AFMC Supplements govern, the Agency maintains that the Arbitrator found that the Supplements provide that the OSHA PEL is the Agency's standard for entitlement to EDP for exposure to asbestos. The Agency notes that the Union conceded, and the Arbitrator found, that the grievance would have been denied if the OSHA PEL were

the standard for entitlement to EDP for exposure to asbestos. The Agency also argues that the Supplements govern because they are not inconsistent with the parties' master labor agreement. In this regard, the Agency notes that the AFMC Supplement sets the standard for payment at the OSHA PEL, and the Arbitrator interpreted the MLA as not setting forth any specific standard for entitlement to EDP. According to the Agency, "[s]etting 'no specific standard' does not conflict with setting a standard at the PEL." *Id.* at 18.

The Agency also contends that the award is contrary to law and that it is based on nonfacts.

B. Union's Opposition

The Union contends that the Agency has failed to establish that the award is deficient.

The Union asserts that the Agency has failed to establish any controlling regulation which specifies that employees must prove exposure to asbestos in excess of the OSHA PEL to be entitled to EDP. The Union argues for a number of reasons that the Supplements are not controlling.

First, the Union argues that the Supplements are inconsistent with the terms of other Agency regulations "which do not reference or incorporate the OSHA PEL." *Id.* at 23. Second, the Union argues that the Supplements are "contrary to the Agency's historical handling and determination of EDP to employees for asbestos exposure which have not entailed any reference to or utilization of the OSHA PEL as the standard for EDP." *Id.* at 24. Third, the Union argues that the Supplements are "inconsistent with the presentations and explanations of the criteria for EDP which the Agency has historically published to employees at KAFB [Kelly Air Force Base] for at least the past 20 years that did not reference and were, in fact, inconsistent with the utilization of the OSHA PEL as the standard for EDP[.]" *Id.* at 25. Fourth, the Union argues that the Supplements are "inconsistent with

internal Agency memoranda which state that OSHA standards are not applicable to KAFB." *Id.* at 26.

Fifth, the Union argues that the Supplements do not govern because they conflict with the master labor agreement. The Union contends that "[t]he Agency contractually agreed through the MLA that 5 C.F.R. [part] 532, not the AFMC Supplement, established the standard and criteria for EDP." *Id.* at 27 (emphasis in original). The Union maintains that Article 26 of the agreement plainly establishes that EDP is to be paid in accordance with law and Government-wide regulation. The Union claims that 5 C.F.R. § 532.511 is the only Government-wide regulation that establishes standards for the payment of EDP because the AFLC/AFMC Supplements are clearly not Government-wide regulations. In addition, the Union maintains that the Supplements conflict with the agreement because "the arbitrator found and interpreted the contract to mean that the parties agreed through the [MLA] that the OSHA PEL would not be the standard for EDP." *Id.* at 41.

Sixth, the Union argues that "[t]he Agency cannot by unilateral and self-serving regulation establish criteria for entitlement to EDP: (a) that [are] different than the criteria established by the Back Pay Act and EDP regulations; and (b) which the Union does not agree, through contract, to accept and utilize." *Id.* at 40. Seventh, the Union argues that there are "practical and compelling safety reasons for not tying EDP to the OSHA PEL." *Id.* at 47. The Union maintains that OSHA has determined that exposure to asbestos at levels below the PEL still presents significant risks. Thus, the Union argues this determination precludes the Agency's position that "only exposure above the PEL entails risk to employees of potential asbestos illness or injury." *Id.* at 50.

Finally, the Union contends that the award is consistent with FLRA case precedent. The Union contends that FLRA case precedent holds that because Appendix A of 5 C.F.R.

part 532 does not set forth any specified level of exposure to asbestos required for the payment of EDP, an arbitrator is free to determine what exposure to asbestos entitles employees to EDP. *See id.* at 42-43.

C. Union's Exception

The Union contends that the Arbitrator's calculation of the amount of backpay is contrary to law and regulation. The Union argues that the Arbitrator's reduction of backpay below the environmental pay differential of 8% for exposure to asbestos is inconsistent with the Back Pay Act and EDP regulations.

D. Agency's Opposition

The Agency contends that in the event that the Authority does not find that the award is deficient on any basis asserted by the Agency in its exceptions, the Arbitrator's calculation of the amount of backpay was within his authority.

IV. Analysis and Conclusions

A. Standard of Review

The Agency contends that consistent with law, the AFLC/AFMC Supplements set the standard for payment of EDP and that the award is inconsistent with that standard. When a party's exception disputes an award's consistency with law and regulation, we review the questions of law and regulation raised by the award and the exception de novo. *See, e.g.*, United States Dep't of Health and Human Services, Centers for Medicare and Medicaid Services, Baltimore, Md., 57 FLRA 704, 706 (2002). Reviewing the questions of law and regulation raised by the award and the Agency's exception de novo, we conclude that the Supplements permissibly set the standard for payment of EDP and that they governed the resolution of the grievance because they are specifically linked to the payment of EDP and because they are not in conflict with the collective bargaining agreement.

B. The AFLC/AFMC Supplements govern the payment of EDP.

1. The standard for entitlement to EDP for exposure to asbestos can be prescribed by an agency regulation.

While the Authority has had many EDP cases, it has not previously been presented with a case where an agency had prescribed the standard for entitlement to EDP by an agency regulation; an arbitrator did not apply the standard prescribed by the regulation in resolving a grievance over EDP; and the agency filed an exception to that award alleging that the award was deficient because it conflicted with the regulation. The first question raised by the Arbitrator's award and the Agency's exception is whether the standard for entitlement to EDP can be prescribed by an agency regulation. We conclude that it can be.

The Authority has repeatedly and uniformly described the framework for determining entitlement to EDP for exposure to asbestos, as follows:

> Appendix A, which is identical to former Appendix J, does not set forth any specified level of exposure required for the payment of EDP. Accordingly, as was the case under Appendix J, the specific work situations for which EDP is payable are left to "local determination, including arbitration."

E.g., United States Dep't of the Army, Red River Army Depot, Texarkana, Tex., 53 FLRA 46, 51 (1997) (Red River Army Depot) (quoting AFGE Local 2280, 51 FLRA 620, 623 (1995); AFGE Local 1482, 50 *FLRA* 572, 574 (1995)). As noted by the Union in its opposition, the Authority has specifically held that an "arbitrator is free to determine the quantitative level of exposure for payment of EDP." *E.g.*, Red River Army Depot, 53 FLRA at 51. At the same time, the Authority has expressly limited that freedom by adding that the arbitrator is free to determine the level of exposure only

"[i]n the absence of a mandated quantitative level set by applicable tlinelaw or regulation or otherwise agreed to by the parties." *Id.* (quoting Allen Park Veterans Admin. Med. Ctr., 34 FLRA 1091, 1101 (1990)).

We find no basis for not interpreting the reference to "regulation" to include an agency regulation. As the Authority has expressly acknowledged, each Federal agency prescribes rules, regulations, and official declarations of policy to govern and control the resolution of matters to which they apply within the agency. *See Ft. Campbell*, 37 FLRA at 193-94. Moreover, the Authority has indicated in two asbestos cases that an agency regulation would have been viewed as permissibly prescribing the standard for entitlement to EDP if the regulation had been sufficiently linked to the payment of EDP. *See* United States Gen. Services Admin., Kansas City, Mo., 38 FLRA 438, 445 (1990) (*GSA*); United States Dep't of Justice, Bureau of Prisons, Fed. Corr. Inst., El Reno, Okla., 37 FLRA 559, 563 (1990) (FCI, El Reno).

The decision in *O'Neall v. United States*, 797 F.2d 1576 (Fed. Cir. 1986) (*O'Neall*) provides additional support for an agency being empowered to set, by regulation, the standard for entitlement to EDP for exposure to asbestos. In *O'Neall*, the court sustained the action of the Department of the Air Force in setting by regulation the standard of exposure to asbestos in order to be entitled to EDP at the same level as the OSHA PEL. In finding that the Department of the Air Force had acted reasonably, the court specifically ruled that deference was due the choice of the Department. *See O'Neall*, 797 F.2d at 1581 n.7.

Accordingly, contrary to the Union's arguments, Authority precedent and the court's decision in *O'Neall* support the conclusion that an agency can prescribe by regulation the standard for entitlement to EDP for exposure to asbestos.

2. The AFLC/AFMC Supplements sufficiently link exposure at the OSHA PEL to the payment of EDP.

A critical question raised by the Authority precedent discussed above is whether the AFLC/AFMC Supplements sufficiently link exposure at the OSHA PEL to the payment of EDP. We conclude that they do.

Both GSA and FCI, El Reno indicate that a critical question in determining whether an agency regulation governs entitlement to EDP is whether the regulation is sufficiently linked to the payment of EDP. In this case, there is no dispute that the AFLC/AFMC Supplements provide that employees must be exposed to asbestos at, or in excess of, the level of the OSHA PEL in order to be entitled to EDP.

The Agency clearly asserts that the Supplements set the level of exposure for EDP and notes that the Authority defers to an agency's interpretation of its own regulations. In addition, the Arbitrator also viewed the Supplements as setting the level of exposure for EDP. The Arbitrator specifically found that the Supplements provide that the OSHA PEL is the standard for entitlement to EDP for exposure to asbestos. *See* Award at 127, 134. Moreover, although the Union disputes that the Supplements govern the standard for EDP, the Union does not dispute that the Supplements link exposure at the OSHA PEL to the payment of EDP.

The Authority has repeatedly held that "[a]n agency's interpretation of its own regulation generally is controlling unless clearly erroneous or inconsistent with the regulation's plain wording." *E.g.*, United States Dep't of Transportation, Fed. Aviation Admin., 55 FLRA 797, 801 (1999) (FAA). We find that the Agency's interpretation of the Supplements is controlling because it is neither clearly erroneous nor inconsistent with the plain wording of the Supplements. Accordingly, we conclude that the AFLC/AFMC Supple-

ments specifically link the payment of EDP to exposure at, or in excess of, the OSHA PEL.

3. The use of the OSHA PEL is appropriate as a standard for entitlement to EDP for exposure to asbestos.

A question raised by the Union's opposition is whether use of the OSHA PEL as a standard for entitlement to EDP is appropriate. We conclude that it is.

In disputing that the Supplements govern the standard for EDP, the Union argues that there are "practical and compelling safety reasons for not tying EDP to the OSHA PEL." Opposition at 47. The Union maintains that OSHA's actual determinations preclude the Agency's position that "only exposure above the PEL entails risk to employees of potential asbestos illness or injury." *Id.* at 50. The Union's arguments are similar to arguments made by the employees in O'Neall and rejected by the court.

The court in *O'Neall* was not persuaded of any material differences in the OSHA and EDP regulatory schemes which made it improper to look to OSHA for guidance in setting a standard for the level of exposure to asbestos in order to be entitled to EDP. In particular, the court rejected the argument that use of the OSHA PEL was inconsistent with the mandate of FPM Supplement 532-1 to compensate for working conditions involving unusually severe hazards. *See O'Neall*, 797 F.2d at 1582.

In addition, although the Authority has never been presented with a case just like this one, the Authority has been presented with several cases in which the arbitrator applied the OSHA PEL to determine entitlement to EDP. In none of these cases did the Authority question whether the OSHA PEL was appropriate for use as an EDP standard. *See* NAGE Local R4-78, 56 FLRA 418 (2000); AFGE Local 2004, 55 FLRA 6 (1998); AFGE Local 2250, 52 FLRA 320 (1996); AFGE Local 2144, 51 FLRA 834 (1996); AFGE

Local 2280, 51 FLRA 620 (1995); AFGE Local 1482, 50 FLRA 572.

4. The AFLC/AFMC Supplements do not conflict with the collective bargaining agreement.

Agency rules and regulations "govern the disposition of matters to which they apply . . . when the rules and regulations do not conflict with provisions of an applicable collective bargaining agreement." *Ft. Campbell*, 37 FLRA at 195. The AFLC/AFMC Supplements clearly apply to the disputed matter of the standard for entitlement to EDP for exposure to asbestos by providing that the standard is the OSHA PEL. On the basis of the Arbitrator's interpretation of the agreement, we find that the Supplements do not conflict with provisions of the agreement.

The fact that the Supplements set the standard for entitlement to EDP for exposure to asbestos at the OSHA PEL does not conflict with the contractual obligation under Article 26 to pay EDP in accordance with law, Government-wide regulation, and the collective bargaining agreement, none of which prescribes a standard for the payment of EDP for exposure to asbestos. As the Arbitrator expressly ruled, "there is no specific standard for entitlement to EDP set forth in the contract," award at 112, and the parties had not "agree[d] to a specific standard for entitlement to EDP," *id.* at 221. Therefore, the Arbitrator interpreted the parties' agreement as not setting forth a specific standard for entitlement to EDP.

Where, as here, an agreement does not set a specific standard and an applicable agency regulation does set a specific standard, the agreement does not conflict with the agency regulation and the agency regulation governs the matter in dispute. *See* NAGE Local R12-33, 51 FLRA 541, 543 (1995) (an agency regulation governed the matter in dispute because it provided the "dispositive criteria" for

determining eligibility, while the agreement did not); United States Dep't of the Army, Army Communications-Electronics Command, Ctr. for Command, Control and Communications Sys., Fort Monmouth, N.J., 46 FLRA 555, 558 n.4 (1992) (an agency regulation governed the matter in dispute because the collective bargaining agreement did "not substantively address" the matter in dispute); United States Dep't of Veterans Affairs, Regional Office, Chicago, 38 FLRA 356, 358 (1990) (VA Chicago) (an agency regulation that permitted the agency's actions governed the matter in dispute because the collective bargaining agreement was "silent" on the matter). Accordingly, we find that the Supplements do not conflict with the agreement, as interpreted by the Arbitrator, and that they govern the matter in dispute as to what standard applies in this case to EDP for exposure to asbestos.

In this regard, we note that the Arbitrator erred as matter of law when he held that "the manner in which the Agency proceeded insofar as EDP was concerned, is not binding upon the Union, unless the evidence establishes that the Union consented to the standard." Award at 127. The proper statement of the law is that where an agency regulation sets a specific standard that addresses a matter in dispute, that standard applies unless it conflicts with the parties' collective bargaining agreement. *See* Ft. Campbell, 37 FLRA at 195. Accordingly, the applicability of the standard set forth in the Supplements does not depend on the Union's consent to the standard; rather, the Supplements govern unless the parties' agreement provides otherwise.

Here, the Arbitrator, in interpreting the parties' agreement, found only that the parties did not agree to the use of a specific standard. He did not interpret the agreement to find that the parties intended to preclude the Supplements from governing. In fact, as noted above, he stated that his "finding that the parties did not voluntarily consent to the use of the OSHA PEL as the standard for entitlement to EDP, does not

necessarily mean that the OSHA PEL should not be the standard adopted by the Arbitrator." *Id.* at 222.

After having interpreted the agreement to find that "the parties did NOT ever agree to a specific standard for entitlement to EDP," the Arbitrator concluded that he "is left with the responsibility and authority to determine whether the bargaining unit employees herein are entitled to EDP." *Id.* at 221 (emphasis in original). However, the Arbitrator erred, as a matter of law, in concluding that where the parties had not agreed on a specific standard, it was his authority to determine the standard. Before concluding that he had such authority, the Arbitrator was required to have considered whether applicable law or regulation set a mandated quantitative level. Consistent with Authority precedent referenced above, where an arbitrator finds that an agreement does not set a specific standard, he or she must examine whether law or regulation, including, as here, an applicable agency regulation, does set a specific standard. *See* AFGE Local 2250, 52 FLRA at 323 ("in the absence of a mandated quantitative level set by applicable law or regulation or otherwise agreed to by the parties, the arbitrator has the authority to determine the threshold quantitative level of exposure for the payment of EDP") (emphasis added). In these circumstances, by operation of Fort Campbell, the agency regulation controls.

We note that parties may, of course, choose in their collective bargaining agreements to reject or modify the applicability of agency regulations to particular situations. Where they do so, the agency regulation would conflict with the agreement provision and, by operation of Fort Campbell, the agreement provision would control. For example, in this case, had the parties agreed to a different specific standard from that set forth in the Supplements, or agreed that the standard would not be determined by the Supplements, the agreement provision would conflict with the Supplements

and, therefore, the agreement provision would control. However, neither of these situations was present in this case.

As noted above, the Arbitrator found that "the parties did NOT ever agree to a specific standard for entitlement to EDP[.]" *Id.* at 221 (emphasis in original). The parties' failure to agree to a specific standard is not the same as saying that the parties agreed that entitlement to EDP would be made on a case-by-case basis. Once the Arbitrator found that there was no specific standard agreed to, he was obligated to determine whether a mandated quantitative level was set by, as relevant here, an applicable regulation. He failed to do so. Rather, he erroneously went on to conclude that because the parties had not agreed to a specific standard, he could determine the standard without reference to the Supplements and that he was free to determine the standard to be applied in this case.

The Union also fails to establish that the Supplements do not govern on the ground that they are inconsistent with other agency regulations, memoranda, or explanations on EDP or because they are inconsistent with the Agency's historical handling of EDP for exposure to EDP. Without addressing the issue of what kind of promulgation or actions would be necessary to override the application of a formal regulation promulgated at the command level of AFMC, none of the documents referenced by the Union establishes a standard for entitlement to EDP for exposure to asbestos that is inconsistent with use of the OSHA PEL or precludes the use of the OSHA PEL as the applicable standard.

Accordingly, we find that the AFLC/AFMC Supplements do not conflict with the agreement, as interpreted by the Arbitrator, and that the Supplements govern the matter in dispute of what standard applies to EDP for exposure to asbestos.

C. The award is deficient.

Under § 7122(a)(1) of the Statute, an arbitration award will be found deficient if it is contrary to any law, rule, or regulation. For purposes of § 7122(a)(1), the Authority has defined "rule or regulation" to include both Government-wide rules and regulations and governing agency rules and regulations. *See, e.g.*, FAA, 55 FLRA at 801 (citing Ft. Campbell, 37 FLRA 186).

As the Supplements set the OSHA PEL as the governing standard for EDP, the Arbitrator's application of a different standard is deficient as contrary to governing regulation. *See, e.g.*, FAA, 55 FLRA at 802 (because the award was inconsistent with an agency regulation that governed the matter in dispute, the award was deficient under § 7122(a)(1) of the Statute).

D. Appropriate Action

As to the question of what action is appropriate, we will set the award aside in its entirety. *See, e.g.,* United States Dep't of the Treasury, United States Customs Serv., Port of New York and Newark, 57 FLRA 718 (2002), petition for review filed sub nom. NTEU Chapter 161 v. FLRA, No. 02-1153 (D.C. Cir. May 17, 2002) (when the FLRA found the basis for an award of backpay was erroneous, the FLRA set aside the backpay award); cf. United States Dep't of Def., Def. Logistics Agency, Def. Distribution Region West, Tinker Air Force Base, Okla., 53 FLRA 460 (1997) (award was set aside because the arbitrator would have reached a different result if he had not misapprehended the status of a union representative). In agreement with the Agency, we view the record as reflecting that the Arbitrator would have denied the grievance had he applied the OSHA PEL as the standard for entitlement to EDP. *See* Award at 122.

V. Decision

The award is set aside.[3]

Member Pope, dissenting:

> I agree with the majority that, in the absence of a conflicting collective bargaining agreement provision, an agency regulation may establish a quantitative standard constituting the level of exposure to asbestos sufficient to trigger environmental differential pay (EDP). In my view, this is a straightforward application of the holding in Allen Park Veterans Admin. Med. Ctr. that an arbitrator may set a quantitative level triggering EDP "[i]n the absence of a mandated quantitative level set by applicable law or regulation or otherwise agreed to by the parties." 34 FLRA 1091, 1101 (1990).

I do not agree with the majority, however, that the Agency regulation controls in this case. In my view, the majority misapplies the basic principle that "collective bargaining agreements, and not agency rules and regulations, govern the disposition of matters to which they both apply when there is a conflict between the agreement and the rule or regulations." United Stated Dept. of Agriculture, 51 FLRA 1210, 1216 (1996) (quoting United States Dept. of the Army, Ft. Campbell Dist., 37 FLRA 186, 194 (1990) (Fort Campbell)).

The parties' agreement provides that EDP will be paid "[i]n accordance with Federal Law, Government-wide regulations and this Agreement." Award at 112 (quoting Article 26.01). As interpreted by the Arbitrator, this provision contemplates case-by-case standards for EDP entitlement to be established in arbitration—not a predetermined quantita-

---

[3] In view of this decision, we need not resolve the Union's exception and the Agency's other exceptions to the award. In addition, we believe that the positions of the parties on the issue on which this decision is based were adequately presented and that oral argument was not warranted.

tive standard established by Agency regulation. Thus, under Fort Campbell, the agreement conflicts with, and therefore takes precedence over, the predetermined quantitative standard established in the Agency's regulation. In my view, this simple analysis dictates rejection of the Agency's exception that the award conflicts with the Agency regulations.

The majority strains to find that the Agency regulation controls because it does not conflict with the agreement. In so doing, the majority ignores the record in this case. In particular, the Arbitrator made extensive, specific findings regarding the parties' intent in agreeing to Article 26.01. According to the Arbitrator's uncontested finding, the parties "entered negotiations . . . with very different objectives insofar as the issue of EDP was concerned." Award at 114. In particular, the Agency wanted "an exact trigger point for when EDP entitlement would be activated" and the Union wanted this to "be determined on a case-by-case method by arbitrators." *Id.* The Arbitrator specifically rejected - as "patently unbelievable"—Agency witness testimony that the Union agreed that Article 26.01 incorporated the permissible exposure limit (PEL) set by OSHA as the trigger for EDP. *Id.* at 126. He concluded that the agreement was "crafted with the apparent intent to incorporate the bargaining objective of the Union to avoid any definition of" the EDP trigger level. *Id.* at 137. These arbitral findings compel a conclusion that the parties' agreement establishes a case-by-case trigger for EDP entitlement and, as a result, conflicts with the Agency regulation. [A1]

[A1] I am at a complete loss to understand the majority's bald assertion that the Arbitrator's findings are not the "same as" a conclusion that "the parties agreed that entitlement to EDP would be made on a case-by-case basis." Majority Opinion at 16. As set forth above, the Arbitrator clearly and specifically found that: (1) the Union's bargaining objective was to avoid agreeing to "any trigger point" and, instead, to "allow[] the definition of 'practically eliminated' to be determined on a case-by-case

The majority distorts the award by relying on the Arbitrator's statements that Article 26.01 contains "no specific standard" to trigger EDP and that the parties had not "'agree[d] to a specific standard.'" Majority at 13 (quoting Award at 112, 221). It is clear, in this regard, that in finding the parties did not agree to a specific standard, the Arbitrator found that they did not agree to a specific predetermined, quantitative standard. As noted above, the Arbitrator undeniably rejected the Agency's argument that the Union had agreed to adopt the OSHA standard and found, as a matter of contract interpretation, that the agreement incorporated the Union's position that the standard would be determined case-by-case in arbitration. Thus, the majority is permitting the Agency to accomplish precisely what Fort Campbell prohibits: trumping a collective bargaining agreement with a conflicting Agency regulation.

The majority adds insult to injury by concluding that the Arbitrator "erred, as a matter of law" in concluding that the Agency regulation was not binding unless the Union consented to it. Majority Opinion at 15. The majority concedes, in this regard, that the Union's consent would be required if the regulation "conflict[ed] with the parties' collective bargaining agreement." *Id.* at 14. As the Arbitrator found that the contract article incorporated the Union's objective to have a case-by-case standard, and rejected the Agency's objective that the standard contained in the regulation be incorporated, there can be no doubt that such a conflict exists.

---

method by arbitrators," and (2) "the words of [the parties' agreement] were crafted with the apparent intent to incorporate the bargaining objective of the Union to avoid any definition of 'practically eliminated.'" Award at 114, 136-37. The majority's unfortunate refusal to acknowledge these facts—or otherwise explain its reasoning—creates the impression that it is reviewing a much different award than the one actually before us and can only cause confusion.

The Authority has consistently held that the specific work situations for which EDP is payable are left to local determination, including arbitration. AFGE, Local 2250, 52 FLRA 320, 322 (1996). The Arbitrator's conclusion that the parties negotiated over this issue and determined that no quantitative level would be set is fully consistent with this precedent and the statutory scheme for collective bargaining. Accordingly, the award is not deficient as inconsistent with the Agency regulations.

In sum, I believe the majority errs in setting aside the award as inconsistent with the Agency regulations and in failing to analyze the remaining exceptions.

APPENDIX D

IN THE MATTER OF ARBITRATION

FMCS CASE NO. 99-17655

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL UNION NO. 1617,
Union,

and

SAN ANTONIO AIR LOGISTICS CENTER, KELLY AIR FORCE BASE, SAN ANTONIO, TEXAS,
Employer.

BEFORE LARRY D. SMITH, ARBITRATOR

APPEARANCES:

For the Union:

Mr. Brian Bishop, Attorney
Gray & Becker
900 West Avenue
Austin, TX 78701 -22 10

Mr. Hal Gillespie, Attorney
Gillespie, Rozen & Watsky
3402 Oak Grove Avenue, Suite 200
Dallas, TX 75204

For the Employer:

Mr. Bud Glavy, Attorney
Department of the Air Force
Kelly Air Force Base
204 Lombard
Kelly AFB, Texas 78241

Major Douglas Cox and other attorneys
General Litigation Division
Air Force Legal Services Agency
AFLSA/JACL
1501 Wilson Blvd., Suite 707
Arlington, VA 22209-2403

TABLE OF CONTENTS

	Page
Award and Opinion	10
PART I.	10
Background; Facts not in dispute, Issues and Jurisdiction, Applicable Statutory, Regulatory, and Contract Language	10
Section 1.01 The Parties:	10
Section 1.02 Jurisdiction:	11
Section 1.03 Issues:	11
Section 1.04 Relevant Contract Sections:	11
Section 1.05 The History of Kelly Air Force Base:	23
Section 1.06 Historical Overview of Collective Bargaining:	24
Section 1.07 Relevant Statutory and Government Wide Regulation Language Regarding Exposure to Dangerous Conditions Including Asbestos:	26
Section 1.08 Air Force Regulations and Kelly AFB Directives/Background:	29
Section 1.09 What is Asbestos?:	40
Section 1.10 Asbestos Related Injury and Illness:	41
Section 1.11 Federal Regulations of Asbestos:	44
Part II.	
Kelly AFB Asbestos Incidents, Selected Exhibits:	46
Section 2.01 I Selected Exhibits of Kelly AFB Asbestos Incidents:	46
Section 2.02 The Unions Grievance and the Agency's Answers:	97

TABLE OF CONTENTS—Continued

Page

Section 2.03 Pre-Hearing Orders: 101

Section 2.04 *AFGE Council 214 v. McClellan AFB*: 101

Section 2.05 *AFGE Local 916 v. Tinker AFB*: 102

Section 2.06 *AFGE Local 91 6 v. United States Air Force* (Tinker AFB): 104

Section 2.07 *AFGE Local 161 7 v. Kelly AFB*: 105

Section 2.08 *AFGE Local 161 7 1'. Kelly AFB*:..... 106

Section 2.09 Prior Article 25 and 26 Grievances and Protest by Local 161 7: 107

Part III.

Threshold Issue Standard for EDP: 112

Section 3.01 Summary of the Competing Positions:.. 112

Section 3.02 The Bargaining History of Articles 25 and 26: 113

Section 3.03 Agency Evidence that Post-MLA Course of Dealing Shows an Intent to use OSHA PEL- "Givens letter", AFOSH Regulations, Grievances and Arbitrations: 119

Section 3.04 Did the Parties Agree that the OSHA PEL Would Determine Entitlement to EDP?: 121

Section 3.05 Does the Course of Dealing Between the Parties Subsequent to the MLA Evidence an Intent to use the OSHA PEL?:..... 127

Section 3.06 The Effect of Prior Grievance/Arbitration Proceeding:..... 131

TABLE OF CONTENTS—Continued

Page

Section 3.07 Conclusion: The Evidence is Insufficient to Establish that the Parties Agreed to be Bound by the OSHA PEL as the Standard for EDP.. 136

Part IV.

Threshold Issues Continued,

Timeliness and Arbitrability 137

Section 4.01 Terms of the Contract Relating to Timeliness:..... 137

Section 4.02 Position of the Employer Regarding Timeliness:..... 138

Section 4.03 Position of the Union Regarding Timeliness:..... 140

Section 4.04 The Duty to Notify: 143

Section 4.05 Selected Exhibits Regarding Timeliness: 143

Section 4.06 Testimony on the Matter of Timeliness:..... 149

Section 4.07 Conflicting Duties Under the Contract: 153

Section 4.08 Did the Union Comply with Section 6.09? Did the Agency Comply with Section 25.11? .. 155

Section 4.09 Assessing the Responsibility Percentages:..... 170

Section 4.10 Arbitrability:..... 174

Section 4.11 Findings on the Threshold Issues: 175

TABLE OF CONTENTS—Continued

PART V Page

Merits of the Grievance,

Questions to be Addressed 175

Section 5.01 The Ambient Air..... 176

Section 5.02 Indoor Levels of Asbestos: 178

Section 5.03 Fact Witnesses: 179

Section 5.04 Expert Witnesses: 190

Section 5.05 Medical Records Maintained by Kelly AFB: 209

Section 5.06 Union Sponsored Chest Screenings and Summary of Findings of Expert B-Readers: 213

Section 5.07 Air Sampling Reports: 215

Section 5.08 The Agency's Position Regarding the Appropriate Standard for the Payment of EDP: 216

Section 5.09 The Union's Position Regarding the Appropriate Standard for the Payment of EDP: 219

Section 5.10 Should the OSHA PEL be used to Determine Eligibility for EDP? 221

Section 5.11 If not the OSHA PEL, then what is the Standard for EDP Entitlement? 231

A. The positions of the Parties Represents Extremes and Creates Difficulty in Reaching a Specific Standard..... 232

B. *OSHA v. the Agency on the Matter of Linear Modeling*..... 232

C. Studies on Asbestos Exposure 234

TABLE OF CONTENTS—Continued

Page

D. Regulatory Language Pertaining to EDP Entitlement 239

E. How Regulatory Language Effects the Burden of Proof 240

PART VI.

Tying Everything Together

The Standard for Asbestos EDP Under the MLA

Airborne Concentrations of Asbestos Fibers

Potential for Injury or Illness

Protective Measures 242

Section 6.01 Vastness of the Case: 242

Section 6.02 Have Bargaining Unit Employees Been Exposed to Airborne Concentrations of Asbestos Fibers? 243

Section 6.03 Is it Reasonably Possible that such Exposure may Result in Injury or Illness? 247

1. The air sampling data, and other evidence, demonstrates that the historic asbestos exposure levels has substantially exceeded asbestos levels found in the ambient air. 249

2. The air sampling data, and other evidence, demonstrates that the historic asbestos exposure levels has substantially exceeded asbestos levels normally found in a well maintained building 251

3. There is substantial reason to believe that exposure to low-level concentrations of chrysotile asbestos may lead to asbestos related disease or injury. 253

TABLE OF CONTENTS—Continued

Page

4. The risk of asbestos related injury or illness increases as the length of the exposure period increases..... 255

5. Kelly AFB medical records verify that certain employees contracted asbestos related injury or illness..... 256

6. Kelly AFB documents reveal isolated episodes of high release of asbestos fibers..... 257

7. Kelly AFB records document that the job duties of certain bargaining unit positions require contact and/or exposure to asbestos..... 258

8. It is possible that historic air sampling results understate the level of asbestos exposure experiences by unit employees..... 258

9. The effectiveness of abatement projects in lowering asbestos exposure levels is questionable..... 260

10. Kelly AFB disclosed known hazardous conditions to lessees and to the Greater Kelly Development Counsel, including the presence of ACM..... 261

Section 6.04 Presence of Pleural Plaques Not Considered:..... 261

Section 6.05 Has Protective Equipment or other Safety Device Essentially Removed the Possibility of Asbestos Related Injury or Illness?..... 263

Section 6.06 The Preponderance of Evidence Establishes Eligibility to EDP for Kelly AFB Unit Employees:..... 270

TABLE OF CONTENTS—Continued

PART VII. Page

Mitigation

Remedy 270

Section 7.01 Bargaining Unit Employees are Entitled to EDP: 271

Section 7.02 Determining an Appropriate Remedy - Factors of Mitigation: 271

PART VIII.

Findings 281

PART IX.

Jurisdiction is Retained

Attorney Fees 284

Section 9.01 Jurisdiction is Retained: 284

Section 9.02 Attorney Fees: 284

AWARD AND OPINION

The above captioned matter came on to be heard on October 16, 2000. The hearing continued on consecutive business days until completed on October 31, 2000. The parties were ably represented, given ample opportunity to examine and cross-examine the witnesses, to introduce relevant evidence, to be heard in connection with any objection, to offer oral and written argument, and to file pre and post-hearing briefs. Following very careful consideration of the voluminous record, the Arbitrator makes the following findings of fact and legal conclusions therefrom:

PART I

Background: Facts Not In Dispute, Issues and Jurisdiction, Applicable Statutory, Regulatory, and Contract Language

Section 1.01
The Parties

The parties hereto are the Department of the Air Force, Kelly Air Force Base, hereinafter referred to as the Agency or Employer, and the American Federation of Government Employees Local Union No. 1617, hereinafter referred to as the Union.

Section 1.02
Jurisdiction

The parties stipulated that the Arbitrator was properly selected, pursuant to the parties' collective bargaining agreement, and that the Arbitrator has jurisdiction to determine all the issues as set forth, *infra*.

Section 1.03
Issues

a) Is the dispute arbitrable?

b) Was the grievance timely filed?

c) Did the parties contractually agree that entitlement to Environmental Differential Pay would be tied to the OSHA Permissible Exposure Limit?[1]

d) Did the Agency violate any provision of the parties' collective bargaining agreement by failing and refusing to pay Environmental Differential Pay?

e) What remedy, if any, is appropriate?

Section 1.04
Relevant Contract Sections

ARTICLE 1—PARTIES TO THE AGREEMENT

This labor-management Agreement is executed pursuant to the exclusive recognition of the National Office American Federation of Government Employees (AFGE), AFL-CIO, hereinafter referred to as the Union, as the certified bargaining agent for the consolidated bargaining unit of employees defined in Article 2 below and employed by the Air Force Materiel Command (AFMC), hereinafter referred to as the Employer. In accordance with the provisions of Title VII of the Civil Service Reform Act of 1978 (CSRA), the following articles constitute the collective bargaining Agreement into by an between the Union, on behalf of the American Federation of Government Employees, Council Number 214, AFMC Locals, and the Employer.

---

[1] Issues a-c were identified in a pre-hearing Order dated April 24, 2000.

The reference to rules, regulations and policies throughout this Agreement refer to the rules, regulations and polices (sic) effective upon the date of execution of this Agreement.

References to days throughout this Agreement refer to calendar days, whether stated as "days" or "calendar days", unless specifically referred to as "work days".

ARTICLE 2—RECOGNITION AND COVERAGE

Section 2.01: Recognition and Coverage

Subject to the inclusions listed in Section 2.02 and the exclusions listed in Section 2.03, the units to which this Agreement is applicable are composed of all nonsupervisory, nonprofessional employees at the following Air Force Materiel Command facilities paid from appropriated funds and who are serviced by AFMC Civilian Personnel Offices:

a. Hill Air Force Base, Ogden, Utah
Kelly Air Force Base, San Antonio, Texas
McClellan Air Force Base, Sacramento, California
Newark Air Force Base, Newark, Ohio
Robbins Air Force Base, Warner Robins, Georgia
Tinker Air Force Base, Oklahoma City, Oklahoma
Wright-Patterson Air Force Base, Dayton, Ohio
Cataloging and Standardization Center, Battle Creek, Michigan

b. The parties acknowledge that the existing certificate may be amended/clarified in the future to include employees (as described above) not presently covered by this Agreement. Upon receipt of a new certification from the Federal Labor Relations Authority, Council 2 14, as the exclusive representative, and AFMC shall meet and negotiate over provisions of this Agreement which affect any additiona/new activities being certified. The parties agree to modify this contract or negotiate (through delegation) a local supplement for

each new activity to satisfy the requirements of any article of the Agreement which may specifically identify Locals or numbers.

Section 203: Exclusions

The following are excluded from the unit:

Management officials, supervisors, professionals, employees engaged in federal personnel work other than a purely clerical capacity, and employees paid from nonappropriated funds. . .

Article 3—Rights and Obligations

Section 3.01: Conformance to Law

In the administration of all matters covered by this Agreement, officials of the Employer and the Union and employees of the bargaining unit are governed by all applicable laws, rules, and regulations.

Article 6—Negotiated Grievance Procedure and Alternative Dispute Resolution

Section 6.01: Scope and Coverage

This Article shall constitute the sole and exclusive procedure available to the Employer and the Union, and employees of the bargaining unit for the resolution of grievances subject to the control of the Employer applicable to any matter involving the interpretation, application, or violation of this Agreement or local supplements thereto, any matter involving the working conditions, or any matter involving the interpretation and application of policies, regulations: and practices of the Air Force, AFMC, and subordinate AFMC activities not specifically covered by this Agreement.

Section 6.04: Extensions of Time Limits

Time limits in this Article may be extended by mutual agreement of the Employer and the Union. Mutual agreement must be in writing and signed by the activity Local Union President, or a designated representative, and the activity Labor Relations Officer, or a designated representative. Management's failure to respond or meet will permit the grievance to be elevated to the next step.

Section 6.09: Union or Employer Grievances at Activity Level

For grievances between the Employer and the Union at the activity level, the following procedures apply.

c. If the Union is aggrieved, the president or designee of the resident activity AFGE Local shall submit the grievance in writing to the Commander or designee of the activity within 20 calendar days of the act or awareness of the act causing the grievance. . .

Article 7—Arbitration

Section 7.05: Questions of Grievability/Arbitrability

The arbitrator shall have the authority to make all grievability and/or arbitrability determinations. Questions of arbitrability involving the applicability of statutory appeals shall be submitted to an arbitrator by brief, and decided prior to a hearing, unless otherwise mutually agreed upon. If the arbitrator determines there is a reasonable basis that the issue is arbitrable, he will hear the merits of the underlying grievance and decide the issues together. Upon mutual agreement of the parties, such threshold issues may be submitted to the arbitrator by brief, and decided prior to a hearing on the merits of the underlying grievance.

* * * *

Section 7.06: Proceedings—Arbitrator's Authority—Award

The arbitrator's authority is limited to deciding only the issue or issues considered in the formal grievance. If the parties fail to agree on a joint stipulation of the issue for arbitration, then each shall submit a separate stipulation and the arbitrator shall determine the issue or issues to be heard. The arbitrator is empowered to fashion an appropriate remedy consistent with the terms of this contract and in accordance with applicable law, rule or regulation. Either side reserves the right to argue to the arbitrator what such an appropriate remedy should be.

The arbitrator's award shall be binding on the parties and implemented upon receipt, unless appealed and stayed. Either party may file exceptions to the arbitrator's award in accordance with the CSRA.

Any dispute over the application or interpretation of an arbitrator's award, including remanded awards, shall be returned to the arbitrator for settlement.

Article 25—Health and Safety

Section 25.01: General Policy

The Employer agrees to establish and maintain a comprehensive occupational safety and health program, and to make every effort to provide safe and healthful workplaces and working conditions as required by applicable regulations. The Employer and the Union agree to cooperate in a continuing effort to avoid, reduce the possibility of, and/or eliminate accidents, injuries, and health hazards in all areas under the Employer's control. The Employer agrees to comply fully with all provisions of Executive Order No. 12196 as implemented within DOD and 29 CFR Part 1960.

Section 25.03: Local Activity Committees

* * * *

The parties recognize that temperature conditions in and around work areas can have a direct bearing on employees' comfort, morale, health and safety. In determining the stress that temperature extremes may place upon an individual employee, the personal comfort and health of the employee will be taken into consideration as well as related factors such as wind chill factor, air flow, the work to be performed, and similar considerations. Where the Employer's Bioenvironmental Office determines that the effective temperature in a particular work area or site exceeds recognized standards for the degree of work being performed, the Employer will take precautionary measures to reduce the risk to employees exposed. Such measures will include reduction of work being performed, increased frequency or duration of rest periods, etc. This section shall apply to both heat and cold exposure situations. Protective clothing for such situations will be provided where authorized in accordance with Section 25.05.

Section 25.10: Exposure to Hazardous Conditions

The Employer agrees that methods and operating procedures will be such that personnel will not be unnecessarily exposed to occupational safety/health hazards, except where such exposure is a necessary part of the employee's official duties. Employees performing such duties will be compensated in accordance with Article 26, Hazard and Environmental Pay, and applicable regulations cited therein.

Section 25.11: Imminent Danger Situations

When an employee, during the course of performance of official duties, believes he or she is exposed to a health or safety hazard which presents an imminent danger which may cause death, injury, occupational illness, loss of a facility, or

major property damage, said employee shall cease the activity and immediately contact the nearest available supervisor. The supervisor shall then make an evaluation of the situation after discussion with the appropriate safety personnel and decide as to whether work may proceed. The union will be advised and specific information provided when requested.

* * * *

Article 26—Hazard and Environmental Pav

Section 26.01: Wage Grade Governing Regulations

In accordance with Federal Law, Government-wide regulation and this Agreement, an environmental differential will be paid to eligible wage grade employees who are exposed to hazard or physical hardships.[2]

---

[2] Article 26 was originally written as follows:

Hazard and Environmental Pay

Section 26.01: Wage Grade Governing Regulations

In accordance with FMP Supplement 532-1, Subchapter S8-7c, an environmental differential will be paid to a wage employee who is exposed to hazard, physical hardship or a working condition listed under the categories in Appendix J of this subchapter.

Section 26.02 Recommended Amendments To Regulations

The parties agree that either the Union or the Employer may submit recommendations for amendments to categories in Appendix J to the OPM.

Section 26.03: Union Membership on EDP Committee

The Union will be permitted to designate one representative to serve on any committee which may be established to implement FPM Supplement 532-1 with respect to environmental pay. All disputes over the payment of environmental differential pay will be resolved through the negotiated grievance and arbitration procedure.

Section 26.04: General Schedule Regulations

Pay for irregular duty involving physical hardship or hazard for GS employees will be paid in accordance with the provisions of the FPM.

Section 26.02: Union Membership on EDP Committee

The Union will be permitted to designate one representative to serve on any committee which may be established with respect to environmental pay. The representative will receive hazard material training on a yearly basis. All disputes over the payment of environmental differential pay will be resolved through the negotiated grievance and arbitration procedure.

Section 26.03: General Schedule Regulations

* * * *

> show that grievants work environment does not subject them to levels of asbestos exposure beyond the safe limits established by OSHA and the Air Force. In addition, safety measures have been implemented with Union participation-the A-Team-to further reduce the exposure hazard. Thus, grievants duty does not involve them in unusually severe working condition or unusually severe hazards with a potential for illness or injury. The safety measures taken are fairly and reasonably responsive to the needs of hazard abatement which, in composite, have practically eliminated the potential for personal illness or injury. This, in turn requires a determination that the employer has not violated Articles 25 and 26 of the parties Master Labor Agreement by denying grievants Environmental Differential Pay under terms and conditions made explicit by the Federal Personnel Manual.

There is zero doubt that the Agency has consistently believed that Article 26 should be understood to have adopted the OSHA PEL as the standard for entitlement to pay differential. The Agency communicated this position in the so-called "Givens' letter" and has never wavered one-inch therefrom, regardless of the audience, But the Agency mistakes their determination to have Article 26 mean

something other than what it says; to equal acquiescence, by the Union, thereto. No credible evidence exists to show that the Union has ever, from the bargaining table activity of the first MLA to the time of the filing of this grievance, agreed that EDP entitlement occurs only in the event of a breach of the OSHA PEL. To the contrary, the Union (Local 1617 and the AFGE National Union) has always contended that EDP should be considered and decided on a case-by-case basis without any strict reliance upon the OSHA PEL or for that matter, any other specific level of exposure. While it is true that the Union has not successfully prosecuted its position, that does not render its position nugatory. The position of the Union simply has not carried the day, with previous grievances and arbitrations being decided against it. This is fundamentally different, and light years removed from, acceptance of the Agency's interpretation. It is not acceptance. Rather, it is regrettable tolerance.

It is important to observe that there is no language in the MLA with respect to whether prior arbitration awards should be considered as conclusive on future disputes regarding the same issue. Rather, the MLA only casually outlines the duties and responsibilities of the arbitrator in hearing a dispute. It must be presumed that the parties intended to avoid any strict rules or they could have easily included language such as:

> At the outset of the hearing, either party may submit to the arbitrator, a copy of a previously decided arbitration between the parties. If the arbitrator believes that the previous arbitration addresses the same issue being presented to him/her, the arbitrator shall summarily issue judgment consistent with the previous award, without necessity of a hearing on the merits.

The MLA actually offers no guidance as to how much weight, if any, that prior arbitration awards should be given. Absent specific MLA language controlling the question, it should be presumed that the intent of the parties was to confer

upon the arbitrator the duty of determining the proper weight that should be accorded to previous decisions. The test that will be employed herein is that the merits of this case will be decided, *de novo*, based solely upon the evidence presented to this Arbitrator. This approach fairly considers prior grievance/arbitration activity, inasmuch as those prior cases are a part of the record. They will be given that weight which the Arbitrator, upon considering all the evidence, deems appropriate. While this approach eliminates the perfunctory task of applying, *res judicata*, it does permit for an evaluation of all evidence and maximizes the chances of succeeding in the ultimate task of reaching the right decision, for the right reasons.

Upon first review of the various arbitration awards interpreting Article 26 of the MLA, one notion becomes glaringly obvious. Prior prosecutions of Article 26 grievances pales in comparison with the all out assault waged by the Union in the instant proceeding. While this Arbitrator would not dare to believe that his wisdom exceeds that of any of the esteemed arbitrators previously, it is clear that the other arbitrators did not have in any of their records the wealth of evidence presented to the undersigned. It is quite possible the other arbitrators reached the right conclusion based upon the evidence presented to them. It is similarly possible that one or more of them would have reached an entirely different conclusion if confronted with the type and quality of evidence in this plentiful record.

While it is true, that in the prior arbitrations the AFGE affiliate bringing the action did complain that there exists no safe level of asbestos exposure, that position was not polished with medical and scientific evidence. The best attempt at such, was a feeble reliance upon a newspaper article citing a government official on the subject. This Arbitrator would have been unmoved by such a tactic, relying principally upon the legal principle of burden of proof. If the union cares no

more for its case, than to try to prove its case through a hearsay newspaper article, then it deserved the fate of a no remedy decision. Based upon the limited evidence presented, it is understandable that prior arbitrators concluded that the evidence was insufficient to prove that exposure below the PEL was unsafe or potentially unsafe. The primary responsibility for the proper and full development of the record belongs with the parties, not with the presiding arbitrator. The arbitrator must only reach those conclusions of fact and law that the record reasonably permits. That does not automatically mean that the issue was correctly decided. Rather, it only signifies that the parties received justice in direct relationship to the manner in which they performed their responsibility of fully and adequately presenting the merits of the dispute to the appointed trier of fact.

Based upon an assortment of reasons, some of which have been mentioned and others will become apparent as this AWARD continues, the Arbitrator will give prior arbitration decisions only that weight which is warranted in the opinion of the Arbitrator. The outcome of this case will be determined solely by the state of this record and not by summary reference to a previously decided case. The Arbitrator was engaged to evaluate the merits of this grievance, and that shall be done objectively and thoroughly.

Section 3.07

Conclusion: The Evidence is Insufficient to Establish that the Parties Agreed to be Bound by the OSHA PEL as the Standard for EDP.

Most of the Agency's arguments with respect to the OSHA PEL are highly relevant to the processing of this case. Some of the arguments go directly to the question of timeliness, and whether the Union complied with the time requirements imposed by the MLA to bring its grievance. They have little, to no, relevance, however, to the matter of whether the OSHA

PEL was the agreed upon standard of EDP entitlement. By definition, in order to reach agreement to use the OSHA PEL, there must have been mutual consent thereto. As noted previously, Mulholland never consented to use the OSHA PEL, and the words of the MLA were crafted with the apparent intent to incorporate the bargaining objective of the Union to avoid any definition of "practically eliminated." Whether the issue is examined in connection with the collective bargaining history, or in connection with the course of dealing between the parties, there is insufficient evidence to establish that the parties agreed that the OSHA PEL would serve as the trigger point for EDP.

Accordingly, for all the reasons cited hereinabove, the Arbitrator finds:

The MLA does NOT prohibit entitlement to Environmental Differential Pay for asbestos exposure below the OSHA PEL.

PART IV

Threshold Issues Continued

Timeliness and Arbitrability

Section 4.01

Terms of the Contract Relating to Timeliness

Article 6 of the MLA sets forth the applicable requirements for the timely filing of grievances. Section 6.09b provides:

> Section 6.09: UNION OR EMPLOYER GRIEVANCES AT ACTIVITY LEVEL
>
> * * * *

PART VI

Tying Everything Together—The Standard for Asbestos EDP under the MLA,

Airborne Concentrations of Asbestos Fibers,

Potential for Injury or Illness,

Protective Measures

Section 6.01

Vastness of the Case

The hearing in this dispute lasted approximately 3 weeks. The hearing produced thousands of pages of transcript, and many more thousands of exhibits. Many of the exhibits spanned hundreds of pages. The total pages of exhibits in evidence probably exceeded 500,000 pages.

The parties fiercely contested this case, devoting significant resources in the prosecution and defense of their respective positions. It is exceedingly clear that the case is of enormous importance to the parties. The economic stakes are enormous as well.

The Arbitrator is well aware of the need to reach the right conclusions. To order an award of EDP to employee undeserving thereof does a major disservice to the taxpayers of the United States. To deny EDP to employees subjected to dangerous conditions is equally repugnant to the goal of equitable treatment. To this end, the Arbitrator has carefully considered the arguments of the parties and the evidence received into the record. The task has been a monumental challenge.

Fortunately, the Arbitrator's task was made easier due to the superb presentations by the parties. The parties are to be commended for their hard work and for their excellent command of the subject matter. It was an honor to have served as Arbitrator.

* * * *

into direct contact with ACM were not fitted for respirators. The Agency had in place directives concerning the use of respirators, but did not act thereupon because it believed that any operation at or below the OSHA PEL was risk free. The notion of the use of protective equipment never was integrated into operations because of management's dogmatic adherence to the belief that the OSHA PEL was a guarantee of safety.

Section 6.06

The Preponderance of Evidence Establishes Eligibility to EDP for Kelly AFB Unit Employees

For all the reasons heretofore cited, the Arbitrator finds that Kelly unit employees were exposed to airborne concentrations of asbestos that may have had the potential of causing asbestos related injury or illness, and protective equipment or other safety device did not practically eliminate the potential for such injury or illness.

PART VII

Mitigation

Remedy

Section 7.01

Bargaining Unit Employees are Entitled to EDP

The Arbitrator has already concluded that the Union has shouldered its burden of proof with respect to establishing eligibility to EDP under the parties' contract and under federal regulation. The Arbitrator's remarks and conclusions in this PART of the Award should not be viewed as any retreat from the findings of entitlement to EDP. The remarks in this PART relate only to the appropriate remedy and to mitigating circumstances.

Section 7.02

Determining an Appropriate Remedy—Factors of Mitigation

The Arbitrator has already made glancing reference to the fact that each party presented extreme positions in forging their positions. The Agency's position that entitlement should not be triggered, unless or until the Agency violates the law, seems as unreasonable as the Union's position that any exposure activates entitlement. But the parties' rigidity of positions is not totally their fault. The manner in which the EDP case law has evolved almost guarantees that parties must take such extreme positions.

For reasons never made clear to the Arbitrator, the function for determining entitlement to EDP, for wage-grade bargaining unit employees, has been declared to be a "local" issue. This means that arbitrators decide entitlement on a case-by-case basis. Such a methodology compels inconsistent findings of entitlement and inconsistent interpretation of the EDP regulation. Such an approach inescapably leads to situations where one group of federal wage-grade employees is compensated for asbestos exposure and another group, under almost identical conditions, is denied such payment. How public policy is advanced by this vacillating approach is unknown to the Arbitrator. It would seem, at least to the Arbitrator, that the regulatory language should have the same meaning and value regardless of the location of the work. The language has not

* * * *

the Agency may apply for a special exception to the general remedy, hereinafter entered. The Agency shall have the burden of establishing that employees worked in ACM free buildings. The Arbitrator will then issue a supplemental AWARD and ORDER in connection therewith.[85]

---

[85] Shortly before the issuance of this AWARD, and many months after the close of the record, the Agency wrote the Arbitrator concerning

PART VIII

Findings

1. The Arbitrator is fully empowered to decide each and every issue of this dispute.

2. The parties did not contractually agree to use the OSHA PEL as the point of entitlement to EDP.

3. The Union violated Article 6 of the parties' collective bargaining agreement by not timely submitting its grievance.

4 The Agency violated Section 25.12 by €ailing to give notice of a potentially dangerous condition.

5. The Agency's violation of Section 25.12 was a contributory cause of the Union's failure to abide by Article 6.

6. The proper remedy for the Union's Article 6 violation, and the Agency's Section 25.12 violation, is to apportion fault on an 30% and 20% basis. The Union's claim, from 5

---

asbestos air sampling which had occurred following the tragic attacks on the New York City's World Trade Center and the Pentagon. The Agency attached a newspaper article, OSHA National News Releases, and an EPA news release. The newspaper article indicates that the destruction resulted in airborne asbestos levels in the range of 0.0013 to 0.009 fibers per cubic centimeter. Some of the other material indicates only that asbestos was undetected or was found to be at very low levels. The purpose of the Agency in submitting this material to the Arbitrator was clearly to impress that since the clean-up work was allowed to proceed m the midst of known asbestos levels, that the US Government was in effect sanctioning the notion that low-level exposure is not unsafe. Not surprisingly, OSHA did not disavow any of its many previous statements of "significant risk" below the PEL in any of the material. At the time of the submission of this material, the Arbitrator was more than 75% finished with this AWARD and had already reached conclusions with respect to the core issues of this dispute. The material submitted was not timely and properly received into the record. The Agency has made no formal request to reopen the record and such a motion would be denied in any event, The material is not a part of the official record and is rejected.

years prior to the filing of the grievance until 20 calendar days prior to the filing of the grievance, is discounted to 20%.

7. Bargaining unit employees have been exposed to airborne concentrations of asbestos fibers.

8. It is reasonably possible that such exposure may result in injury or illness.

9. Protective equipment or other safety device has not essentially removed the possibility of such injury or illness.

10. The Agency violated Section 26.01 of the collective bargaining agreement and such a violation is an unwarranted and/or unjustified personnel act.

11. The Agency's unwarranted and/or unjustified personnel act entitles employees to compensation pursuant to the Back Pay Act, in order to remedy the failure of the Agency to pay an environmental differential in violation of Article 26.01.

12. Entitlement to EDP has been proven by a preponderance of the evidence.

13. There are mitigating factors that require a reduction in the amount of compensation awarded. EDP is to be discounted to 50% from 6 years prior to the filing of the grievance until the present.

14. The authorized rate of pay for EDP is 8% of the hourly rate of a wage grade 10, step 2 employee for all times in a pay status.

15. The combined effect of finding number 6 and finding number 13 is as follows:

> A) From April 9, 1993 until March 20, 1999, all unit employees are to be paid an environmental differential equal to 10% of the EDP rate set forth in number 14. This is equivalent to 0.8% of the rate for a wage grade 10, step 2.

B) From March 21, 1999 until the present, all unit employees are to be paid an environmental differential equal to 50% of the EDP rate set forth in number 14. This is equivalent to 4% of the rate for a wage grade 10, step 2.

16. The Agency may petition that named employees should not receive environmental differential pay based upon a showing that said employees worked in buildings constructed in or after 1989.

17. All findings herein apply solely to asbestos.

18. Interest at the applicable statutory rate shall be paid on all monies due employees under finding number 15.

PART IX

Jurisdiction is Retained

Attorney Fees

Section 9.01
Jurisdiction is Retained

The Arbitrator retains jurisdiction to decide any issue concerning this AWARD which might be in controversy.

Section 9.02
Attorney Fees

The parties agreed that the issue of the right to attorney fees would be decided following the issuance of this AWARD, pursuant to the following exchange at the hearing:

> Union Counsel: So the submission (application for attorney's fees), if any, will be after the conclusion of this hearing?
>
> Arbitrator: If that's the way both sides want to handle it, that's all right with me.

Agency Counsel: Sir, that would be after the issuance of the decision?

Arbitrator: Right.

In accordance with the agreement of the parties, jurisdiction to decide any application for the award of attorney fees is retained.

AWARD

The grievance is sustained only insofar as is consistent with this AWARD. The Agency is ordered to:

1) Pay all bargaining unit employees in pay status from April 9, 1993 to March 20, 1999, an environmental differential equal to 0.8% of the wage rate of WG-10, second step.

2) Pay all bargaining unit employees in pay status from March 21, 1999 to the present, an environmental differential equal to 4% of the wage rate of WG-10, second step.

3) Pay applicable interest.

The Arbitrator retains jurisdiction.

Signed on the 9th day of October, 2001.

/s/ Larry D. Smith
LARRY D. SMITH, Arbitrator
705 W. Crawford
Denison, TX 75020

APPENDIX E

5 U.S.C. § 7101. Findings and purpose

(a) The Congress finds that—

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

APPENDIX F

5 U.S.C. § 7102. Employees' rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

APPENDIX G

5 U.S.C. § 7104. Federal Labor Relations Authority

(a) The Federal Labor Relations Authority is composed of three members, not more than 2 of whom may be adherents of the same political party. No member shall engage in any other business or employment or hold another office or position in the Government of the United States except as otherwise provided by law.

(b) Members of the Authority shall be appointed by the President by and with the advice and consent of the Senate, and may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office. The President shall designate one member to serve as Chairman of the Authority. The Chairman is the chief executive and administrative officer of the Authority.

(c) A member of the Authority shall be appointed for a term of 5 years. An individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. The term of any member shall not expire before the earlier of—

(1) the date on which the member's successor takes office, or

(2) the last day of the Congress beginning after the date on which the member's term of office would (but for this paragraph) expire.

(d) A vacancy in the Authority shall not impair the right of the remaining members to exercise all of the powers of the Authority.

(e) The Authority shall make an annual report to the President for transmittal to the Congress which shall include information as to the cases it has heard and the decisions it has rendered.

(f)(1) The General Counsel of the Authority shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The General Counsel may be removed at any time by the President. The General Counsel shall hold no other office or position in the Government of the United States except as provided by law.

(2) The General Counsel may—

(A) investigate alleged unfair labor practices under this chapter,

(B) file and prosecute complaints under this chapter, and

(C) exercise such other powers of the Authority as the Authority may prescribe.

(3) The General Counsel shall have direct authority over, and responsibility for, all employees in the office of General Counsel, including employees of the General Counsel in the regional offices of the Authority.

APPENDIX H

5 U.S.C. § 7105. Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolves issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

(b) The Authority shall adopt an official seal which shall be judicially noticed.

(c) The principal office of the Authority shall be in or about the District of Columbia, but the Authority may meet and exercise any or all of its powers at any time or place. Except as otherwise expressly provided by law, the Authority may, by one or more of its members or by such agents as it may designate, make any appropriate inquiry necessary to carry out its duties wherever persons subject to this chapter are located. Any member who participates in the inquiry shall not be disqualified from later participating in a decision of the Authority in any case relating to the inquiry.

(d) The Authority shall appoint an Executive Director and such regional directors, administrative law judges under section 3105 of this title, and other individuals as it may from time to time find necessary for the proper performance of its functions. The Authority may delegate to officers and employees appointed under this subsection authority to perform such duties and make such expenditures as may be necessary.

(e)(1) The Authority may delegate to any regional director its authority under this chapter—

(A) to determine whether a group of employees is an appropriate unit;

(B) to conduct investigations and to provide for hearings;

(C) to determine whether a question of representation exists and to direct an election; and

(D) to supervise or conduct secret ballot elections and certify the results thereof.

(2) The Authority may delegate to any administrative law judge appointed under subsection (d) of this section its authority under section 7118 of this title to determine whether any person has engaged in or is engaging in an unfair labor practice.

(f) If the Authority delegates any authority to any regional director or administrative law judge to take any action pursuant to subsection (e) of this section, the Authority may, upon application by any interested person filed within 60 days after the date of the action, review such action, but the review shall not, unless specifically ordered by the Authority, operate as a stay of action. The Authority may affirm, modify, or reverse any action reviewed under this subsection. If the Authority does not undertake to grant review of the action under this subsection within 60 days after the later of—

(1) the date of the action; or

(2) the date of the filing of any application under this subsection for review of the action; the action shall become the action of the Authority at the end of such 60-day period.

(g) In order to carry out its functions under this chapter, the Authority may—

(1) hold hearings;

(2) administer oaths, take the testimony or deposition of any person under oath, and issue subpoenas as provided in section 7132 of this title; and

(3) may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

(i) In the exercise of the functions of the Authority under this title, the Authority may request from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority.

APPENDIX I

5 U.S.C. § 7122. Exceptions to arbitral awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient—

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations; the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

APPENDIX J

5 U.S.C. § 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination), may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the

Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts busi ness for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause

notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

(2)

SUPREME COURT, U.S.
FILED
DEC 29 2004
OFFICE OF THE CLERK

No. 04-438

In the Supreme Court of the United States

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1617, ET AL., PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

DAVID M. SMITH
Solicitor

JAMES BLANDFORD
Attorney
Federal Labor Relations Authority
Washington, D.C. 20424

QUESTION PRESENTED

Whether the district court lacked subject-matter jurisdiction over petitioners' challenge to a decision by the Federal Labor Relations Authority which set aside an arbitration award on the ground that the award was "contrary to [a] law, rule, or regulation" under 5 U.S.C. 7122(a)(1).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Board of Governors of the Fed. Reserve Sys. v. *MCorp Fin., Inc.*, 502 U.S. 32 (1991)	5, 8
Boire v. *Greyhound Corp.*, 376 U.S. 473 (1964)	5, 8
Bureau of Alcohol, Tobacco & Firearms v. *FLRA*, 464 U.S. 89 (1983)	2
Leedom v. *Kyne*, 358 U.S. 184 (1958)	4, 5, 7, 8
United States Dep't of the Army, Fort Campbell Dist., Third Region, 37 F.L.R.A. 186 (1990)	4
United States Dep't of the Treasury v. *FLRA*, 43 F.3d 682 (D.C. Cir. 1994)	10
United States Dep't of Veterans Affairs Med. Ctr., 60 F.L.R.A. No. 67, 2004 WL 2248115 (Sept. 24, 2004)	10
United Steelworkers v. *American Mfg. Co.*, 363 U.S. 564 (1960)	6
United Steelworkers v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)	6, 9
United Steelworkers v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960)	6

Statute and regulation:

Civil Service Reform Act of 1978, Tit. VII, 5 U.S.C. 7101 *et seq.*	2
5 U.S.C. 7104	2
5 U.S.C. 7105(a)(2)(H)	2

Statute and regulation—Continued: Page

5 U.S.C. 7122(a)(1) 2, 3, 5, 9, 10
5 U.S.C. 7122(a)(2) 2, 9, 10, 11
5 U.S.C. 7123(a) 2, 4
5 C.F.R. 532.511 2

In the Supreme Court of the United States

No. 04-438

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1617, ET AL., PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not published in the Federal Reporter, but is *reprinted in* 103 Fed. Appx. 802. The order of the district court (Pet. App. 11a-19a) is unreported. The report and recommendation of the magistrate judge is unreported, but is *available in* 2003 WL 21919486. The decision of the Federal Labor Relations Authority (Pet. App. 20a-41a) is reported at 58 F.L.R.A. 63.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 2004. The petition for a writ of certiorari was filed on September 27, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, governs labor relations between federal agencies and their employees. That statute established the Federal Labor Relations Authority (FLRA), 5 U.S.C. 7104, which plays a role analogous to that of the National Labor Relations Board (NLRB) in the private sector, *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 92-93 (1983). Among its other responsibilities, the FLRA is empowered to review the decisions of arbitrators in disputes involving federal employees, 5 U.S.C. 7105(a)(2)(H), and to set aside such a decision either on the ground that it is "contrary to any law, rule, or regulation," 5 U.S.C. 7122(a)(1), or "on other grounds similar to those applied by Federal courts in private sector labor-management relations," 5 U.S.C. 7122(a)(2). Although final orders by the FLRA are ordinarily subject to review by the federal courts of appeals, orders involving arbitral awards are not, unless the underlying dispute concerns unfair labor practices. 5 U.S.C. 7123(a).

2. a. Petitioners are a labor union, its successor, and an employee of the San Antonio Air Logistics Center (the Center) at Kelly Air Force Base in San Antonio, Texas. In April 1999, acting through the union, a group of employees brought a grievance against the Center, contending that they were entitled to receive Environmental Differential Pay (EDP), pursuant to 5 C.F.R. 532.511, as a result of their exposure to airborne asbestos. The Center denied the grievance, and the union invoked arbitration pursuant to the employees' collective bargaining agreement. Pet. App. 2a.

b. The arbitrator sustained the grievance and awarded EDP to the employees. Pet. App. 42a-70a (ex-

cerpts of decision). The arbitrator noted that the employees' collective bargaining agreement established no specific level of exposure to asbestos at which the employees' entitlement to EDP would be triggered. *Id.* at 22a. Moreover, the arbitrator found that an Air Force regulation adopted a standard issued by the Occupational Safety and Health Administration (OSHA) as the standard for determining entitlement to EDP for exposure to asbestos. *Id.* at 22a-23a. Under the OSHA standard, it was conceded that the employees would not be entitled to EDP. *Id.* at 21a. Nevertheless, the arbitrator refused to apply the OSHA standard contained in the Air Force regulation. *Id.* at 24a. The arbitrator reasoned that "there [was] insufficient evidence to establish that the parties agreed that the OSHA [standard] would serve as the trigger point for EDP." *Id.* at 63a. Instead, the arbitrator concluded that the employees were entitled to EDP because "it [was] reasonably possible that [their] exposure may result in injury or illness," and because "[p]rotective equipment or other safety device[s] [have] not essentially removed the possibility of such injury or illness." *Id.* at 68a.

c. Over the dissent of one member, the FLRA set aside the award on the ground that it was "contrary to [a] law, rule, or regulation" for purposes of 5 U.S.C. 7122(a)(1). Pet. App. 20a-41a. The FLRA explained that, under its own precedent, an arbitrator could establish a standard for determining entitlement to EDP only when neither the agreement of the parties nor an applicable regulation had already set such a standard. *Id.* at 29a-30a. According to the FLRA, the Air Force regulation at issue was properly read to establish a standard for entitlement to EDP. *Id.* at 30a-33a. The FLRA then rejected the union's contention that the Air Force regulation conflicted with the terms of the em-

ployees' collective bargaining agreement. *Id.* at 33a-36a. The FLRA reasoned that the arbitrator erred by failing to recognize that, "where an agency regulation sets a specific standard that addresses a matter in dispute, that standard applies unless it conflicts with the parties' collective bargaining agreement." *Id.* at 34a (citing *United States Dep't of the Army, Fort Campbell Dist., Third Region*, 37 F.L.R.A. 186, 195 (1990)). It was irrelevant that the union did not specifically consent to the regulatory standard, because the collective bargaining agreement neither adopted its own standard nor disavowed the application of the regulatory standard. *Id.* at 35a-36a.

3. Notwithstanding 5 U.S.C. 7123(a), which precludes federal courts of appeals from reviewing most final orders of the FLRA involving arbitral awards, petitioners filed suit against respondent FLRA in the United States District Court for the Western District of Texas, challenging the FLRA's decision. A magistrate judge recommended dismissal of petitioners' suit for lack of subject-matter jurisdiction, 2003 WL 21919486, and the district court adopted the magistrate judge's report and recommendation, Pet. App. 11a-19a. The district court reasoned that, in light of 5 U.S.C. 7123(a), there was no subject-matter jurisdiction over petitioners' action unless it fell within the "narrow" and "rarely used" exception articulated by this Court in *Leedom* v. *Kyne*, 358 U.S. 184 (1958). Pet. App. 15a. In *Leedom*, the district court noted, this Court recognized an exception to the general rule that federal district courts lack jurisdiction to review decisions of the NLRB, holding that jurisdiction exists over cases in which the NLRB acted "in excess of its delegated powers and contrary to a specific prohibition in the [National Labor Relations Act]." *Id.* at 17a (quoting *Lee-*

dom, 358 U.S. at 188). The district court concluded that "[petitioners] have not demonstrated that the [FLRA]'s decision to apply a regulatory standard for EDP, when the collective bargaining agreement did not expressly provide any specific standard for EDP (or even an express 'case by case' standard), was in excess of statutory powers, in violation of a clear mandate of its own enabling statute, or an egregious error." *Id.* at 17a-18a.

4. In an unpublished *per curiam* opinion, the court of appeals affirmed. Pet. App. 1a-10a. Like the district court, the court of appeals observed that the *Leedom* exception to the general jurisdictional bar is "very narrow." *Id.* at 4a. The court of appeals noted that, in subsequent decisions, this Court has refused to apply the *Leedom* exception when a party was merely challenging a factual finding by the NLRB, or when the authorizing statute at issue provided a meaningful opportunity for other judicial review. *Id.* at 4a-5a (citing *Boire* v. *Greyhound Corp.*, 376 U.S. 473 (1964), and *Board of Governors of the Fed. Reserve Sys.* v. *MCorp Fin., Inc.*, 502 U.S. 32 (1991)). The court concluded that the *Leedom* exception "should be used to correct only egregious error" and "does not allow federal courts to review whether an agency responsible for implementing a statute has misinterpreted that statute." *Id.* at 5a.

Applying that standard, the court of appeals held that petitioners could not demonstrate that the FLRA had violated any statutory provision by overturning the arbitrator's award. Pet. App. 6a-8a. The court reasoned that the FLRA "found that the award was deficient because it was contrary to law" for purposes of 5 U.S.C. 7122(a)(1). Pet. App. 6a. The court rejected petitioners' contention that the FLRA had overturned the arbitrator's factual findings. *Id.* at 7a. As the court ex-

plained, the arbitrator found only that the union had taken the position *in bargaining* that the standard for entitlement to EDP should be determined on a case-by-case basis; the arbitrator did not find that the collective bargaining agreement itself contained such a requirement. *Id.* at 7a-8a. The court concluded that "FLRA acted within its authority in determining that Agency regulations govern the assessment of EDP in this case, where there was no other agreement governing that assessment." *Id.* at 8a.

Finally, the court of appeals rejected petitioners' arguments that jurisdiction should nevertheless lie either under this Court's decisions in the "*Steelworkers* trilogy"[1] or for reasons of public policy. Pet. App. 8a-10a. As to the former argument, the court explained that the decisions in the *Steelworkers* trilogy "deal with federal court review of employment arbitration decisions" and "do not provide guidance on this court's jurisdiction over FLRA decisions." *Id.* at 9a. As to petitioners' public-policy concerns, the court reasoned that the FLRA's decision did not undermine the right to collective bargaining, because it did not hold that an agency regulation could trump a provision in a collective bargaining agreement. *Id.* at 10a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

---

[1] *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960).

1. Petitioners contend (Pet. 15-19) that the court of appeals' decision conflicts with this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), and its progeny. That contention lacks merit.

In *Leedom*, the NLRB issued an order certifying a bargaining unit that included certain professional employees, notwithstanding the fact that the NLRB had not held a separate vote of the professional employees, as expressly required by the National Labor Relations Act, in order to determine whether they supported the unit. 358 U.S. at 185-186. Although the certification order was not a "final order" subject to judicial review, this Court allowed an employee to challenge the order in federal district court. *Id.* at 187-188. The Court held that, when a party was seeking to "strike down an order of the [NLRB] made in excess of its delegated powers and contrary to a specific prohibition in the [National Labor Relations Act]," a federal district court would have jurisdiction. *Id.* at 188. The Court reasoned that it could not "lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Id.* at 190.

In this case, the court of appeals held (Pet. App. 5a-6a) that the *Leedom* exception to the general rule concerning federal-court jurisdiction over NLRB decisions *could* apply to decisions by the FLRA involving arbitral awards—even though the FLRA's authorizing statute contains a clear indication of Congress's intent to preclude judicial review of those decisions. Because the court of appeals expressly recognized the availability of the *Leedom* exception for challenges to FLRA decisions, petitioners cannot colorably claim that the court of appeals' decision conflicts with *Leedom* itself.

Petitioners further contend (Pet. 16, 18) that the court of appeals erred by "applying" this Court's decisions in *Boire* v. *Greyhound Corp.*, 376 U.S. 473 (1964), and *Board of Governors of the Federal Reserve System* v. *MCorp Financial, Inc.*, 502 U.S. 32 (1991), to decisions of the FLRA. In those cases, this Court refused to allow the *Leedom* exception to be invoked at all, either because a party was merely challenging a factual finding by the agency (in *Boire*) or because the authorizing statute at issue provided a meaningful opportunity for other judicial review (in *MCorp*). See *Boire*, 376 U.S. at 481; *MCorp*, 502 U.S. at 43-44. Although the court of appeals discussed both *Boire* and *MCorp* (Pet. App. 4a-5a), it did not rely on either of those cases in order to "extinguish[] *Leedom* jurisdiction in its entirety," as petitioners suggest (Pet. 16); instead, the court cited those cases solely for the proposition that the *Leedom* exception is "narrow" and "rarely applied"—a proposition that petitioners do not contest (Pet. 17). Nothing in the court of appeals' decision is inconsistent with either *Boire* or *MCorp*.

In the alternative, petitioners seemingly suggest (Pet. 18-19) that the court of appeals erred in its *application* of the *Leedom* exception by holding that the district court lacked subject-matter jurisdiction in this case. That narrow, case-specific claim, however, does not merit this Court's review. The court of appeals concluded (Pet. App. 6a-8a) that the FLRA had not acted "in excess of its delegated powers and contrary to a specific prohibition in [its authorizing statute]" by setting aside the arbitral award, *Leedom*, 358 U.S. at 188, because the FLRA had set aside the award on the ground that it was "contrary to [a] law, rule, or regulation" for purposes of 5 U.S.C. 7122(a)(1). Specifically, the court of appeals determined that the FLRA, relying

on the arbitrator's finding that the collective bargaining agreement did not adopt a standard for determining eligibility for EDP, had merely applied its own binding precedent that, "in the absence of an agreed-upon [standard,] the [a]gency's own regulation governs." *Id.* at 8a. Although petitioners question whether the FLRA correctly construed the arbitrator's findings, they do not assert that the court of appeals' ultimate holding (*viz.*, that the *Leedom* exception was inapplicable) conflicts with the decision of any other court in similar factual circumstances. Accordingly, further review of that holding is not warranted.[2]

2. Petitioners also contend (Pet. 10-15, 19-23) that the court of appeals' decision conflicts with the *Steelworkers* trilogy. That contention lacks merit as well.

In the *Steelworkers* trilogy, this Court held, in the context of private-sector arbitral awards, that an arbitrator's construction of a collective bargaining agreement is entitled to a high degree of deference. See, *e.g.*, *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Petitioners assert that 5 U.S.C. 7122(a)(2), which authorizes the FLRA to set aside a public-sector arbitral award "on * * * grounds similar to those applied by Federal courts in private sector labor-management relations," requires the FLRA to use the same standards applicable to the review of private-sector arbitral awards, and therefore to use the deferential standard of review articulated in the

---

[2] Contrary to petitioners' repeated assertions, moreover, the FLRA did not conclude that the arbitrator had misinterpreted the collective bargaining agreement, and then substitute its own interpretation; instead, the FLRA merely concluded that the arbitrator himself had interpreted the collective bargaining agreement as not adopting a standard for determining eligibility for EDP. Pet. App. 35a-36a.

Steelworkers trilogy. In cases arising under Section 7122(a)(2), courts have consistently suggested that the standard of review from the *Steelworkers* trilogy governs, see, *e.g.*, *United States Dep't of the Treasury* v. *FLRA*, 43 F.3d 682, 687 (D.C. Cir. 1994), and the FLRA itself applies a highly deferential standard of review when considering an arbitrator's interpretation of a collective bargaining agreement, see, *e.g.*, *United States Dep't of Veterans Affairs Med. Ctr.*, 60 F.L.R.A. No. 67, 2004 WL 2248115, at *4 (Sept. 24, 2004).

Whatever the appropriate standard in cases involving 5 U.S.C. 7122(a)(2), however, it has no relevance to this case. The FLRA set aside the arbitral award at issue not under Section 7122(a)(2), but rather under Section 7122(a)(1), which authorizes the FLRA to invalidate an award when it is "contrary to any law, rule, or regulation."[3] Courts have held that, when acting under Section 7122(a)(1), the FLRA may review an arbitrator's legal determination *de novo*, see, *e.g.*, *Department of Treasury*, 43 F.3d at 687, and petitioners do not challenge the use of *de novo* review in cases arising under that subsection. Because any question concerning the applicability of the *Steelworkers* trilogy to cases arising under Section 7122(a)(2) is not properly presented here, further review on that question is unwarranted.

---

[3] Petitioners do not directly challenge the FLRA's decision to set aside the arbitral award here under Section 7122(a)(1) rather than Section 7122(a)(2). In any event, such a challenge (like petitioners' challenge to the court of appeals' application of the *Leedom* exception, see pp. 8-9, *supra*) would necessarily be case-specific and would not merit this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

DAVID M. SMITH
Solicitor

JAMES BLANDFORD
Attorney
Federal Labor Relations Authority

DECEMBER 2004

No. 04-438

Supreme Court, U.S.
FILED
JAN 10 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1617; ARTHUR CELESTINO; AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL NUMBER 214,
Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

HAL K. GILLESPIE *
GILLESPIE, ROZEN, WATSKY, MOTLEY & JONES P.C.
3402 Oak Grove Avenue, Suite 200
Dallas, Texas 75204
(214) 720-2009

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF ARGUMENT	1
I. RESPONDENT'S ARGUMENT THAT SECTION §7122(a)(2) HAS NO IMPACT ON §7122(a)(1) LACKS MERIT	1
II. RESPONDENT'S ARGUMENT THAT THIS PETITION IS CASE SPECIFIC IS UNFOUNDED	6
CONCLUSION	7

TABLE OF AUTHORITIES

CASES Page

Circuit City Stores v. Adams, 532 U.S. 105 (2001) 7
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 7
Kelly v. Robinson, 479 U.S. 36, 43 (1986) 6
Leedom v. Kyne, 358 U.S. 184, 79 S.Ct. 180 (1958) 4, 5, 6, 7
United Paperworkers v. Misco, Inc., 484 U.S.29 (1987) 2, 6
United States Dept. of Treasury v. FLRA, 43 F.3d 682, 686-687 (D.C. Cir. 1994) 2, 4, 5
United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) ..... *passim*
United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960) ..... *passim*
United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) ..... *passim*

STATUTES

5 U.S.C. §7122(a)(1) ..... *passim*
5 U.S.C. §7122(a)(2) ..... *passim*

IN THE

Supreme Court of the United States

No. 04-438

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1617; ARTHUR CELESTINO; AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL NUMBER 214,
Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

I. RESPONDENT'S ARGUMENT THAT SECTION § 7122(a)(2) HAS NO IMPACT ON § 7122(a)(1) LACKS MERIT

Respondent misstates petitioner's position. Respondent claims that petitioners do not challenge the use of *de novo* review in cases arising under § 7122(a)(1). Resp. 10. Respondent, like the Fifth Circuit, thus misses the crux of petitioner's argument. While *de novo* review under § 7122 (a)(1) is not directly at issue (since *de novo* review may certainly occur under § 7122(a)(1) without trammeling *Steelworkers*), whether with *de novo* review or otherwise, § 7122

(a)(1) does not grant authority to the FLRA to do anything it wants, including the authority to overturn an arbitrator's interpretation of a collective bargaining agreement.

Respondent acknowledges that the extremely limited arbitral review allowed under the *Steelworkers* Trilogy[1] has been consistently applied by previous courts, including the District of Columbia Circuit in *United States Dep't of the Treasury v. FLRA*, 43 F.3d 682, 687 (D.C. Cir. 1994), to FLRA decisions arising out of Section 7122(a)(2) of the Federal Labor Management Relations Act (the FLMRA). Resp. 9-10. Despite this concession, Respondent seeks to avoid the Fifth Circuit's split from the D.C. Circuit, and the Fifth Circuit's repudiation of this Court's holdings in the *Steelworkers* trilogy and *United Paperworkers v. Misco, Inc.*, 484 U.S.29 (1987), by arguing that § 7122(a)(2) and *Steelworkers* have, "no relevance to this case," because the FLRA conducted its review under Section 7122(a)(1), not Section 7122(a)(2). Resp. 10.

Respondent states (Resp 10):

> Because any question concerning the applicability of the *Steelworkers* trilogy to cases arising under § 7122(a)(2) is not properly presented here, further review on that question is unwarranted.

Respondent's argument in inappropriate because the Fifth Circuit has literally ruled, with respect to both Sections 7122 (a)(1) and (2):

> The *Steelworker* Trilogy opinions, however, deal with federal court review of employment arbitration decisions, not federal court review of FLRA decisions. The

---

[1] *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, (1960); *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

Steelworker Trilogy opinions **do not provide guidance on this court's jurisdiction over FLRA decisions.**

Pet. App 9a. (emphasis added). This ruling represents a split with the District of Columbia Circuit.

Moreover, even if the Fifth Circuit had limited its pronouncement to cases supposedly arising just under § 7122 (a)(1), Respondent misses a key point. This case squarely presents the unresolved and important question—the question of whether the *Steelworkers* Trilogy applies to cases arising under § 7122(a)(1). After all, Respondent concedes that the *Steelworkers* trilogy applies to cases arising under § 7122 (a)(2). In other words, this Court should say, yes or no, whether under § 7122(a)(1) analysis by the FLRA, the arbitrator's interpretation of a collective bargaining agreement is sacrosanct, as it (everyone except the Fifth Circuit agrees) must be under § 7122(a)(2) analysis.

Respondent employs a circular argument. The majority of the FLRA engaged in classic review of the merits to "find" that there was no conflict between the MLA and the agency regulation. The starting point was for the FLRA itself to review and construe the MLA, which it freely did (over the dissent of Member Pope). The arbitrator had found that the MLA, given its wording and the bargaining history, conflicted with the agency regulation. The MLA contains an agreement that the level at which exposure to potentially hazardous levels of airborne asbestos was "practically eliminated," per the arbitrator's interpretation of the MLA, would be determined by arbitrators, on a case by case basis. The arbitrator based his interpretation of the MLA on its language and the bargaining history. The case-by-case determination is, per the arbitrator, in conflict with the Air Force regulation which set a single threshold for all cases. The FLRA majority rejected the arbitrator's finding that the MLA deals with the issue and is in conflict with the agency regulation. Per the FLRA majority, the MLA is silent on the standard (case-by-

case determination and silence are different), so there was no conflict with the agency regulation and its across the board standard.

The Fifth Circuit approved this merits review interpretation of the MLA by the FLRA under § 7122(a)(1) and added its own findings as to what the MLA means. The Fifth Circuit, just as one arbitrator might say of another arbitrator's decision, found that bargaining history was no evidence of the meaning of the MLA. App. 7a-8a.

Respondent's circular argument is this: The FLRA **can** interpret the MLA to see if the MLA is in conflict with a law. If so, the FLRA, under § 7122(a)(1) can freely overturn the award based on its interpretation of the MLA, despite the fact that under § 7122(a)(2) the FLRA **cannot** second guess the arbitrator's interpretation of the MLA. Under § 7122(a)(2), the FLRA (just like a district court reviewing an arbitrator's decision in the private sector) is bound by *Steelworkers* and must adhere to the interpretation of the MLA by the arbitrator. A non-circular approach would give effect and meaning to both Sections. Section 7122(a)(1) has ample meaning where the FLRA addresses errors of law, taking the MLA as interpreted by the arbitrator.

Respondent ignores the Fifth Circuit's holding below that the *Steelworkers* doctrine, in connection with § 7122(a)(2), provides "no guidance" in deciding whether or not *Leedom*[2] jurisdiction exists for federal courts to review FLRA decisions in federal collective bargaining under the FLMRA. Pet. App. 9a. The Fifth Circuit's holding creates a split in the circuits and breaks from the District of Columbia Circuit's holding in *United States Dep't of the Treasury v. FLRA* which holds that in questions of contract interpretation, as is the case here, the FLRA is limited under § 7122(a)(2) to the standard

---

[2] *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180 (1958)

of arbitral review found in the *Steelworkers* Trilogy. *United States Dep't of the Treasury v. FLRA* at 687.

Respondent, and the Fifth Circuit, urge a reading of the FLMRA under which Section 7122(a)(2) is rendered meaningless by Section 7122(a)(1). Under the Fifth Circuit's and Respondent's logic, the FLRA is entirely free of the strict limitations of the *Steelworkers* Trilogy by merely stating, as both it and the Fifth Circuit have done here, that its decision which reinterprets the meaning of the parties' collective bargaining agreement is actually made pursuant to § 7122(a)(1) instead of § 7122(a)(2). Under the Fifth Circuit's holding, the FLRA is free to overturn arbitral decisions based upon collective bargaining agreements as long as the FLRA (even over the dissent of one of its members) states that it is *not* overturning the arbitrator's interpretation of the collective bargaining agreement. Worse yet, within the Fifth Circuit, no federal court has jurisdiction under the *Leedom* doctrine to review the FLRA's actions because the Fifth Circuit holds that the *Steelworkers* Trilogy provides no guidance in interpreting §7122(a)(2). App. 9a.

In practice, the Fifth Circuit holding grants all federal agencies that disagree with an arbitrator's interpretation of a bargaining agreement the vehicle to avoid *Steelworkers* and to have arbitration decisions overturned by the FLRA who sits as super arbitrator, simply by claiming that their exception to the award is pursuant to § 7122(a)(1), not § 7122(a)(2). Under the Fifth Circuit's holding, in the federal sector, the FLRA has power to do what this Court has emphatically stated no federal court can do in the private sector, reexamine the merits of the arbitrator's decision based upon the collective bargaining agreement.

The Fifth Circuit and the FLRA urge a reading of the FLMRA in which §7122(a)(1) trumps § 7122(a)(2). Under standard guidelines of statutory interpretation, one clause of a statute cannot be read to the exclusion of another and the

statute must be viewed as a whole. *See Kelly v. Robinson*, 479 U.S. 36, 43 (1986). A federal district court must have *Leedom* jurisdiction to prevent the FLRA from reaching into the exclusive province of the arbitrator. Otherwise there is no remedy for petitioners and the FLRA has effectively stripped petitioners of a right which has been granted by Congress under the FLMRA. The FLRA's circular argument creates a Catch-22 where the FLRA can do whatever it wants, and no court has jurisdiction to stop it, as long as it claims it is acting under § 7122(a)(1).

II. RESPONDENT'S ARGUMENT THAT THIS PETITION IS CASE SPECIFIC IS UNFOUNDED

Respondent also argues, without explanation, that to overturn the errors of this case would necessarily be case specific and does not merit this Court's review. This argument flies in the face of the historical precedent set by *United Paperworkers v. Misco* and *Leedom v. Kyne*. In *Misco*, as here, neither the district court nor the Fifth Circuit took the appropriate action and this Court remedied the overturn of an arbitration award to preserve the *Steelworkers* Trilogy. In *Leedom*, this Court dealt with specific facts to correct an agency that overstepped its statutory guidelines.

Furthermore, Respondent ignores the risk that the Fifth Circuit's opinion below has the certain effect of *permitting* the FLRA to liberally overturn arbitration awards in the federal sector. Although the decision is unpublished, one of the parties (who thus received a copy of the decision) is the FLRA itself. The FLRA is the one and only entity that reviews federal sector arbitration awards. When the only entity that matters (the FLRA itself) has notice of the Fifth Circuit decision, the fact that it is unpublished does not reduce its effect at all. While § 7122(a)(2), written by Congress, says one thing, this decision says another. This decision says *Steelworkers* has no application in the federal sector

(so long as the FLRA engages in second guessing the arbitrator in the name of § 7122(a)(1) review for errors of law).

This Court should resolve the question of whether federal sector arbitration is radically different from private sector arbitration. The Fifth Circuit's holding is at odds not only with the *Steelworkers* Trilogy, the holdings of the District of Columbia Court of Appeals, and earlier more reasoned decisions of the FLRA itself. This decision undercuts federal policy favoring arbitration, a policy furthered by this Court's rulings in *Circuit City Stores v. Adams*, 532 U.S. 105 (2001) and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). If arbitration is to be a workable and fair substitute for litigation (or for concerted activity by unions) arbitration awards must be protected by the doctrine this Court announced in 1960 in the *Steelworkers Trilogy* and federal jurisdiction must be granted under the *Leedom v. Kyne* doctrine if the FLRA subverts the *Steelworkers* Trilogy within the federal sector.

CONCLUSION

For the above and foregoing reasons, Petitioner respectfully prays that the Court grant petition for a writ of certiorari.

Respectfully submitted,

HAL K. GILLESPIE *
GILLESPIE, ROZEN, WATSKY,
MOTLEY & JONES P.C.
3402 Oak Grove Avenue, Suite 200
Dallas, Texas 75204
(214) 720-2009

* Counsel of Record